

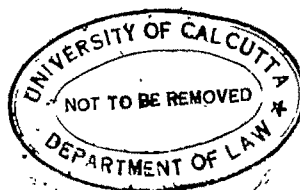
COA- No 5127-87-LF1894.
L.C.

THE
CALCUTTA LAW JOURNAL.

REPORTS OF CASES.

87

DECIDED
BY THE SUPREME COURT OF INDIA
AND
BY THE HIGH COURT AT CALCUTTA.



Vol. 87.
(January to June),
1961.

CALCUTTA
CALCUTTA LAW JOURNAL LTD.
8, OLD POST OFFICE STREET.
All rights reserved.

JUDGES OF THE HIGH COURT.

1951.

Chief Justice.

The Hon'ble Sir Arthur Trevor Harries.

Puisne Judges.

The Hon'ble Mr. Justice A. N. Sen, Barrister-at-Law.

"	T. J. Y. Roxburgh, B. A., C. I. E., I. C. S.
"	A. L. Blank (on leave).
"	P. B. Chakravarti, M. A., B. L.
"	Gopendra Nath Das, M. A., B. L.
"	Rama Prasad Mookerjee, M. A., B. L.
"	Sambhunath Banerjee, Barrister-at-Law.
"	Kamal Chunder Chunder, B. A. (Calc.)
"	M. A. (Oxon.), I. C. S., Barrister-at-Law.
"	Kulada Charan Das Gupta, M. A., I. C. S.,
"	Barrister-at-Law.
"	Surajit Chandra Lahiri, M. A., B. L.
"	Subodh Ranjan Das Gupta, Barrister-at-Law.
"	Prasanta Bihari Mukharji, Barrister-at-Law.
"	Amal Kumar Sarkar, Barrister-at-Law.
"	Jyoti Prakash Mitter, B. A. (Oxon),
"	Barrister-at-Law.
"	Braja Kanta Guha, B. A., (Calc.), I. C. S.
"	Himansu Kumar Bose, Barrister-at-Law.
"	Ranadhir Singh Bachawat, Barrister-at-Law.
"	Deep Narayan Sinha, Barrister-at-Law.
"	Paresh Nath Mookerjee, M. A., B. L.
"	Sailendra Nath Guha Roy, I. C. S.

Advocate-General.

Mr. S. M. Bose.

Senior Standing Counsel.

Mr. Sankar Banerjee.

Senior Government Pleader.

Mr. Chandra Sekhar Sen, M. A., B. L.

GENERAL EDITOR.

Ramendra Mohan Majumdar, M. SC., LL. B.

Joint Editors.

Asoke Kumar Sen, M.A. M. SC., (Econ.) Barrister-at-Law.

AND

Salil Kumar Roy Chowdhury, M SC., LL. B., Barrister-at-Law.

TABLE OF CASES REPORTED.

Vol. 87.

—:(o):—

SUPREME COURT.

	PAGE.
A. M. Mair & Co. v. Gordhandas Sagarmull ...	123
Arjan Singh v. Kartar Singh ...	243
Chittaranjan Mukherji v. Barhoo Mahto ...	420
Firm Srinivas Ram Kumar v. Mahabir Prasad ...	236
The State of Madras v. Sm. Champakan Dorairajan ...	379

FULL BENCH.

Bhuban Mohan Das v. Surendra Mohan Das ...	280
--	-----

SPECIAL BENCH.

Sudhindra Nath Dutta v. Sailendra Nath Mitra ...	140
--	-----

APPELLATE CIVIL.

Bipra Charan Sarkar v. Sm. Rupeswari Dasi ...	37
Maharajadhiraj Uday Chand Mahatab Bahadur v. Sorojini Debi ...	163
Protap Chandra Koyal v. Kali Charan Acharya ...	192

APPEAL FROM ORIGINAL CIVIL.

Baljnath Bajoria v. Sk. Md. Matun ...	33
Devji Shivji v. Santi Sarup Chaturvedi ...	169
Digarmull Kussental v. Sambhu Charan Pandey ...	251
Mahadeo Prasad Rungta v. Sm. Luxmi Debi ...	26
Mehtabchand Dhandia v. Shriratan Mohita ...	24
Mohammad Ibrahim v. Beni Mahhab Mullick ...	345
Sreenarain Mansingka v. Amarnath Mishra ...	4
The State of Bombay v. Adamjee Hajee Dawood & Co. ...	352

CIVIL REVISION.

Dharamsi Liladharvora v. Union of India ...	425
Dr. Jatish Chandra Ghosh v. P. K. Sinha ...	1
Mohan Lal Khettry v. Chunilal Khettry ...	318

PAGE.

Protap Kumar Sen v. Nagendra Nath Mazumder ...	...	414
Sk. Mangru Meya v. Commissioners, Budge Budge Municipality	...	369
Sm. Matangini Dassi v. Kshirodi Narayan Bhunia ..	...	375
Thakurdas Pushparaj v. Dwarka Prasad Bazaz ...	...	181

ORIGINAL CIVIL.

Bhuwarka Brothers Ltd. v. Fateh Chand Murlidbur	...	71
Carlsbad Mineral Water Manufacturing Co. Ltd. v. H. M. Jagtiani	...	149
Rlahi Bux v. Union of India	...	307
Elbridge Watson v. R. K. Das	...	109
Indra Kumar Karnani v. C. C. Ganguly	...	129
Kanchanmala Dassi v. Lilabati Debi	...	332
Krishna Kishore Ghosh v. Kishori Debi Keshani...	...	398
Major Soap Co. Ltd. v. Assistant Commissioner of Commercial Taxes, Calcutta	...	314
Monoranjan Ray v. The Collector of Customs	...	391
Premraj Mundra v. Md. Maneck Gazi	...	41
Sailendra Nath Banerjee v. Satyendra Nath Roy	...	217
Sarkar Brothers v. Anil Kumar Dutt	...	362
Satyendra Chandra Sen v. S. B. Trading Co. Ltd....	...	174
Soorajmull Nagarmull v. The Assistant Collector of Customs ...	...	201

CRIMINAL REFERENCE.

Purnashashi Devi v. Nagendra Nath Bhattacharjee	...	185
---	-----	-----

CRIMINAL REVISION.

A. C. Dhar v. Dhananjoy Das	...	188
Bharadwaj Singh v. The State	...	387

ORIGINAL CRIMINAL.

The State v. Narendra Nath Majumdar	...	58
-------------------------------------	-----	----

TABLE OF CASES CITED.

VOL. 87.

—(10)—

A

	PAGE.
A. C. Mohammed v. The Corporation of Calcutta, (1940) 45 C. W. N. 408 ...	225
Abdul Rahim v. Crown, [1949] I. L. R. Nag. 519 ...	64
Abdul Rahman v. Emperor, (1940) 42 Cr. L. J. 59 ...	62
Ahmed Hossain v. Must Chembelli, (1945) 85 C. L. J. 213 ...	409
Ajadhya Pershad v. Sham Sundar, [1947] I. L. R. Lah. 417 ...	281, 297
Alla Rakha v. Lisakat Hossain, (1939-40) 44 C. W. N. 650 ...	281, 283, 292
Alliance Property Company, Ltd. v. Shaffer, [1948] 2 K. B. 464 ; on appeal [1949] 1 K. B. 367 ...	330
Amulya Pal v. R. N. Roy, (1950) 54 C. W. N. 850 ...	116
Amulya Ratan Bhattacharya v. Meghmala Dutt, (1949) 53 C. W. N. 474 ...	183
Ardeshir Mans v. Flora Sassoon, (1928) L. R. 55 I. A. 360 ...	406

B

B. T. S. Ltd. v. Himachal Pradesh, [1951] A. I. R. Him Pra. 36... ..	369, 374
Babu Raja Mohan Manocha v. Babu Manzood Ahmad Khan, (1942) L. R. 70 L. A. 1 ...	241
Baljnath Narseria v. Chhatulal Setbia (1947-48) 52 C. W. N. 397 ...	357
Balabux's case, (1947) 51 C. W. N. 863 ...	87, 102
Bedanand Rai v. Nabakumar Singh, (1937) I. L. R. 17 Pat. 89 ...	53
Belcher's case, (1901) L. T. 468 ...	74
Bhewani Lal v. Sumran Lal, [1927] A. I. R. Nag. 310 ...	411
Bhador Mal Marwari v. Ram Chandar Marwari, (1920) 55 I. C. 674 ...	281, 294
Bhupendra Nath Singh v. Girdharilal Nagar, (1933) I. L. R. 60 Calc. 1316 ...	281, 291, 292, 300
Bhyro Dutt v. Must. Lakhmanee, (1871) 16 W. R. 123 ...	408
Bibhabati v. Ramendra, (1946) 51 C. W. N. 98 ...	240
Bijai Charan Sahl v. Rudrabageshwari Prasad, (1929) 51 C. L. J. 70 P. C. ...	37, 39
Bristol Corporation v. John Aird & Co. [1913] A. C. 241 ...	98
Bruner v. Moore, [1904] 1 Ch. 305 ...	193, 196, 197

C

C. S. Krishnaswamy Ayyar v. Mohoolal Binjanl, [1949] I. L. R. Mad. 657 ...	137
Chaitram Rambilas v. Brdbhichand Kesri-chand, (1915) I. L. R. 42 Calc. 1140 ...	83

	PAGE.
Chandanmall v. Clive Mills Ltd., (1947) 52 C. W. N. 521	87
Chandrabhinode v. Alabuz, (1920) I. L. R. 48 Calc. 184	164, 167
Chandrika Prasad Singh v. Hirabai, [1924] A. I. R. Pat. 312	51
Charan Das v. Amir Khan, (1920) I. L. R. 48 Calc. 110 (P. C.)	404, 405
Charanjit Lal v. Union of India, [1951] A. I. R. S. C. 42	391
Chaturbhuj Mohanlal v. Bhicam Chand Chororia & Sons, (1948-49) 53 C. W. N. 410	357
Clarpeda v. Commercial Union Association, 32 W. R. 263	403
Clark v. Wray, (1885) 31 Ch. D. 68	404
Constantine Line Case, [1941] 2 All. E. R. 165	89
Crawshaw v. Collins, (1808) 15 Ves. 218	281, 296
Cricklewood Property Case, [1945] 1 All. E. R. 252	88
Cropper v. Smith, (1884) 26 Ch. D. 700	402
Crowley v. Vitty, (1852) 7 Exch. 319	348

D

Darby v. Darby, (1856) 2 Drew. 495	281, 296
Dawoodyal Kothari v. Shibnath Roy Burman, (1942) 46 C. W. N. 651	27, 31
De Le Garde v. Workshop & Co., [1928] Ch. 17	356
Debi Prasad Bhagat v. Nagar Mull, (1908) I. L. R. 35 Calc. 1108	281, 290
Delhi Cloth and General Mills Co. Ltd., v. Income Tax Commissioner, Delhi, (1927) L. R. 54 I. A. 421	119
Deeny Mott's Case, [1944] A. C. 265	90
Deokali Koor v. Kedarnath, (1912) I. L. R. 39 Calc. 404	225
Dhupabai Mini v. Chandra Nath Chakrabarty, (1938) 42 C. W. N. 721	37, 39
Dibbins v. Dibbins, [1896] 2 Ch. 348	193, 195
Doleman v. Ozzett Corporation, [1912] 3 K. B. 257	73
Dominion of India v. Hirabai Bathra, (1949) 53 C. W. N. 817	415, 416
Dorman Lang & Co. Ltd., v. Jagadish Chandra Mahindra, (1934) I. L. R. 62 Calc. 596	227
Dunlop v. Higgins, (1848) 1 H. L. C. 381	193, 197
Durgadas Das v. Nalin Chandra Nandan, (1934) 38 C. W. N. 771	49

E

Eakarsley v. Mersey Docks & Harbour Board, [1894] 1 Q. B. 667	99
Edward Grey & Co. v. Tolme and Runge, (1914) 31 T. L. R. 137	96, 97
Emperor v. Fatehchand Agarwalla, (1916) I. L. R. 44 Calc. 477	61
Emperor v. Girish Chandra Kundu, (1929) I. L. R. 57 Calc. 1042	70
Emperor v. Jagannath Raghunath Das, (1931) 33 Bom. L. R. 1518	281, 293, 300
Emperor v. Kaul Ahir, (1932) I. L. R. 55 All. 112	62, 64
Emperor v. Probbat Chandra Barua, [1927] A. I. R. Calc. 793	364
Emperor v. Sikdar, (1931) I. L. R. 54 All. 411	62
Eshughbay Eleko v. The Government of Nigeria, [1931] A. C. 662	222
Ex parte Bradlaugh, (1878) 3 Q. B. D. 509	215
Ex parte Peling, (1836) 4 Ad. and El. 949	161

		Page.
Fardhan v. Clagget, (1882) 20 Ch. D. 632	...	319, 321
Featherstonehaugh v. Fenwick, (1810) 17 Ves. 298	...	281, 297

G

Gangadas Bhattach v. Jogendra Nath Mitra, (1907) 11 C. W. N. 403	...	37, 40
Gangamoyee v. Manindra Chandra, (1949) 53 C. W. N. 718	...	350
Ganges Manufacturing Co Ltd. v. Indra Chand, (1906) 1 L. R. 33 Calc.	...	84
1169	...	...
Garrison Engineer of Fort William v. Corporation of Calcutta, (1937) 42 C. W. N. 789	...	225, 227
Gian Chand v. King-Emperor (1933) 145 I. C. 232	...	62
Gopal Kriehsaya v. Ramaswami, (1929) 122 I. C. 174	...	410
Gopala Chetty v. Vijayaraghavachariar, [1922] 1 A. C. 488	...	281, 282, 295
Goppee Lall v. Must Chandrasolee, (1873) W. R. 12	...	406
Guruprasad Sukul v. Tarini Charan Debnath, (1938) 42 C. W. N. 1065	...	37, 39

H

Hafi Shamed v. Chattoo, (1941) 46 C. W. N. 474	...	103
Hahooman Persaud v. Mussumat Babooee, (1856) 6 Moore P. C. 410	...	403
Haipershad v. Dulmordan, (1905) 1 L. R. 32 Calc. 891	...	40
Henthorn v. Fraser, [1892] 2 Ch. 27	...	193, 196, 197
Heyman v. Darwins, Ltd., [1942] 1 All. E. R. 337; [1942] A. C. 356	...	128, 355
High Commissioner for India v. Im Lall, (1917) 1 L. R. 75 I. A. 225	...	409
Hirendra Nath Dutt v. The Corporation of Calcutta, (1941) 45 C. W. N. 413	...	225, 235
Hopkins v. Smethwick Local Board of Health, [1890] 24 Q. B. D. 712	...	210
Hriday Ram v. King Emperor, [1946] A. I. R. All 4	...	63, 64

I

Income Tax Commissioner, Bombay Presidency and Aden v. Bombay Trust Corporation, (1936) L. R. 63 I. A. 408, 1 L. R. 60 Bom. 909	...	161, 234
In the matter of East India Cotton Mills Ltd., (1948) 52 C. W. N. 534	...	88

J

Jagat Chandra v. Abdul Rashid, (1937) 38 C. W. N. 1178	...	37, 39
Jai Prokash Narain Singh v. Basanti Kumari Debi, (1911) 15 I. C. 604	...	47
James v. Attood, (1839) 7 Scott 843	...	74
James v. James (1889) 22 Q. B. D. 669	...	74
Jatindra Mohan Das v. Kshitipati Nath Mitra, (1949) Civ. Rev. case No. 203 of 1949 decided by Das & Chunder, JJ. dated 17. 8. 49	...	183
Jatindra v. Manindra (1919) 54 C. W. N. 384	...	341
Jogjiban Ghosh v. King Emperor, (909) 13 C. W. N. 861	...	70
Joy v. Broth, (1836) 7 E. R. 22; 10 Bligh N. S. 201	...	193, 195

K

Kanda v. Waghu, (1949) L. R. 77 I. A. 15	...	406
--	-----	-----

X.

	Page.
Kasinath Das v. Sadasiv Patnik, (1893) I. L. R. 20 Calc. 805	404, 406
Kensowji Issur v. G. I P Railway, (1907) L. R. 34 I. A. 115	247
Khagendra Nath De v. District Magistrate of West Dinajpur, (1950) 53 C. W. N. 53	1, 3
Khurshed Ferose Mode v. The Rent Controller of Bombay, [1946] I. L. R. Bom. 940	137
Khursed Mody v. Rent Controller, Bombay, (1946) 48 Bom. L. R. 565	227
King v. The Bank of England, (1780) 2 Douglas 524; 99 E. R. 734	227, 232
King v. Earl Cadogan, [1915] 1 K. B. 821 at p. 826; on appeal [1915] 3 K. B. 485	362, 364, 365
King v. The Company of Free Fishers and Dredgers of Whitestable, (1806) 7 East 353; 103 E. R. 136	233
King v. London Assurance Company, (1822) 5 Band Ald. 859; 106 E. R. 1420	233
King v. Westminster Assessment Committee, [1917] 2 K. B. 215	215
King v. Woodhouse, [1908] 2 K. B. 501	367
King Emperor v. Upendra Nath Das, (1914) 19 C. W. N. 653	68
Kirk and Randall v. East and West India Docks Co. (1886) 55 L. T. (N. S.) 245	74
Kiron Chandra v. Kali Das, (1943) 47 C. W. N. 460	135
Krishnaji v. Sitaram, (1881) I. L. R. 5 Bom. 496	408
Krishnaji v. Wamnaji, (1894) I. L. R. 18 Bom. 144	408
Kumar Srinivas Prasad Singh v. Keshava Prasad Singh, (1935) L. R. I. A. 12	26, 29
Kurup v. Raman, (1922) 44 M. L. J. 515; [1923] A. I. R. Mad. 553	410

L

Lady Dinubhai Petit v. M. S. Naronha, [1946] I. L. R. Bom. 832	227
Lakshmi Bai v. Raoji, (1872) 9 Bom. H. C. R. 1	408
Lakshminoni Dassi, In re., (1940) 45 C. W. N. 401	235
Lall Chand Roy's case. (1868) 9 W. R. (Cr. Rel.) 37	281, 283, 283
Lalu Singh v. King Emperor, (1942) I. L. R. 18 Luck. 253	63
Lapointe's Case, [1905] A. C. 535	210
Liversidge v. Anderson, [1942] A. C. 206	223
Local Government Board v. Arlidge, [1915] A. C. 120	211
Luchmunarain v. Hoare, Miller & Co. (1913) I. L. R. 41 Calc. 35	95

M

M. D. Iyengar v. G. R. Chetty, [1938] A. I. R. Mad. 669	404
M. M. Isphani Ltd. v. Inspecting Assistant Commissioner of Income Tax, (1948) 53 C. W. N. 434	227
M. Ramanan v. R. D. Khambatta, (1949) 50 Cr. L. J. 151	281, 293
Mao Gregor v. Cawnpur Sugar Works Ltd., (1910) 11 C. L. J. 19	53
Madan Gopal v. Province of West Bengal, (1949) 54 C. W. N. 807	415, 419
Mahant Bhagavathi v. M. Sarangaraja Iyengar, (1931) I. L. R. 54 Mad. 722	137
Maharaja Brendra Kishore Manikya v. Secretary of State for India, (1920) 32 C. L. J. 433	364

	PAGE.
Mahomed Aga v. Jadu Nandan Jha, (1905) 2 C. L. J. 325	164, 166
Mandavalli Satyanarayana Murthi v. Kotha Manikyala Rao, (1940) 187 I. C. 126	281, 294
Man Mohan Das v. Mahendra Bhowal, (1948) 52 C. W. N. 441	281, 292, 300
Manick Chand Mahata v. Corporation of Calcutta, (1921) I. L. R. 48 Calc. 916	226, 227, 228
Manick Lal Memani v. Shiva Jute Bailing Ltd., (1947) 52 C. W. N. 389	357
Manindra Nath Banerjee v. A. K. Fazlul Huq, (1946) 51 C. W. N. 148	178
Ma Shwe Mya v. Maung Mo Hnaung, (1921) L. R. 48 I. A. 214	404, 405
Md. Zahoor Ali Khan v. Musst. Rutta Koer, (1867) 11 M. I. A. 468	404
Meads v. The King, (1948) 10 F. C. R. 67	215
Mehr Bakhsh v. Hari Chand, [1935] A. I. R. Lah. 623	274, 276
Metropolitan Railway Company v. John Jackson, (1877) 3 A. C. 193	68
Mohammad Ismail Maula Bakhsh v. Abdul Majid Khan, (1936) I. L. R. 18. Lah. 580	274, 275
Mohanlal Ramgopal v. Firm Udai Ram, [1936] A. I. R. Pat. 140...	411
Mokhada Soondari v. Ram Churn, (1882) I. L. R. 8 Calc. 871	408
Monmothnath Sett v. Nagendranath Bhattacharya, (1915) A. I. R. [1926] Calc. 855	47
Monro's case, [1915] 3 K. B. 167	95
Morgan v. Manser, [1943] 1 K. B. 185	91
Morrison v. London County and Westminster Bank Ltd., [1914] 3 K. B. 356	302
Moti Lal v. Government of the State Uttar Pradesh, [1951] A. I. R. All. 257	369, 374

N

Nanilal Ray v. Satyendra Nath Ray, (1949) 54 C. W. N. 42	227
Nicholson v. Smith, (1882) 22 Ch. D. 640	193, 198
Niharmala v. Sarojbandhu, (1933) 37 C. W. N. 897	37, 40
Noor Muhammad v. Natwar Lal, (1919) I. L. R. 45 All. 220	411
Nowroji Pudumjee Siradar v. The Deccan Bank Ltd., [1921] A. I. R. Bom. 69	50
Nrigendro Lall Chatterjee v. Okhoy Coomar Shaw, (1874) 21 W. R. (Cr.) 59	298

O

Oswal Trading Co. v. Amar Chand & Co., Decision of Sinha, J. dated 14th March, 1950	102
---	-----

P

P. K. Banerjee v. L. J. Simonds, [1947] A. I. R. Calc. 307	161
Parasotim v. Lal Mobar, (1931) L. R. 58 I. A. 254	247
Patri Shaw v. R. N. Roy, (1950) 54 C. W. N. 855	116
Piddocke v. Burt, [1854] 1 Ch. 343	284, 299
Pragdas Mathuradas v. Income Tax Officer, Central Circle I, Calcutta, (1950) 86 C. L. J. 77	116

	PAGE.
Pravash Chandra Dutta v. Santhal Pargana Electric Supply Corporation Ltd., (1944) 48 C. W. N. 640	27, 31
Property Holding Company Limited v. Clark, [1948] 1 K. B. 630	329, 330
Prosad Chunder De v. Corporation of Calcutta, (1913) 1 L. R. 40 Calc. 836	225, 226
Province of Bombay v. Khushaldas Advani, [1950] A I R Sup Court	209
Province of West Bengal v. Midnapore Zemindary Co. Ltd., (1949) 85 C. L. J. 203	311

Q

Queen v. Charity Commissioners, [1897] 1 Q. B. 407	227, 229
Queen v. Churchwardens of All Saints Wigan, [] 1 A. C. 611	224
Queen v. Okhoy Coomar Shaw, (1874) 13 B. L. R. 307	281, 283, 289, 294
Queen v. Registrar of Joint Stock Companies, (1888) 21 Q. B. D. 131	228, 231
Queen v. Southampton Port Commissioners, (1870) L. R. 4 H. L. 449	228, 230
Quinn v. Leatham, [1901] A. C. 495	88, 231

R

R v. Archbishop of Canterbury, (1812) 15 East 118; 104 E. R. 789	231
R v. Barnet, [1950] 2 All. E. R. 216	362, 368
R v. Birmingham Rent Tribunal, [1951] 1 All. E. R. 198	362, 366, 367
R v. Brahmley, (1822) Russ. & Ry. 478 C. C. R. 302	302
R v. City of London etc Rent Tribunal, [1951] 1 All. E. R. 195	362, 368
R v. Dymock, [1915] 1 K. B. 147	227, 230
R v. Fulham Hammersmith and Kensington Rent Tribunal, [1950] 2 All. E. R. 211	362, 368
R v. Holden, [1912] 1 K. B. 483	302
R v. Kingston, [1949] 1 All. E. R. 260	138
R v. Leicester Union, [1899] 2 Q. B. 632	227, 230
R v. Radnor, (1446) 5 Jur. 460; 16 Emp. Dig. 329	235
R v. St. Pancras Church Trusts, (1835) 3 Ad. and El. 535; 111 E. R. 517	235
R v. The Marquis of Stafford, (1790) 3 T. R. 617; 100 E. R. 782	232
R v. Warburton, (1870) L. R. 1 C. C. R. 274	302
R v. Woobster, (1861) Le. & Ca. 77 C. C. R. 302	302
Radha Shyam Basak v. Secretary of State for India, (1916) 1 L. R. 44 Calc. 16	425, 429
Ragho v. Vishnu, (1903) 5 Bom. L. R. 329	408
Rai Bahadur Atulya Dhan Banerji v. Sudhangshu Bhusan Dutt, (1950-51) 55 C. W. N. 343	319, 320
Rajindra Nath Saha v. Sree Saraswati Press Ltd., (1950) 86 C. L. J. 186	410
Ram Khelwan Singh v. Singheswar Prasad Singh [1928] A I R Pat. 172	52
Ram Swarup v. Chiranjalal, [1941] A. M. L. J. 30	53
Ramjibun Serowgy v. Oghore Nath Chatterjee, (1897) 1 L. R. 25 Calc. 401	262, 264
Ramsaran Mandar v. Mahabir Sahu, (1926) L. R. 54 I. A. 55	405
Rashid Ahmed v. Municipal Board, [1950] A I. R. S. C. 163	369, 374
Re: Barlow, (1861) 30 L. J. Q. B. 271	228

	PAGE.
Re : F. Bourne, (1906) 2 Cm. 427	281, 296
Re : Gerard (Lord) and London and North Western Railway Company, [1894]	
2 Q. B. 915	75
Re : Lakshminoni Dassi, (1940) 45 C. W. N. 421	225
Re : Nathan, (1884) 12 Q. B. D. 461	231, 391
Re : Smith & Service and Nelson & Sons, (1890) 25 Q. B. D. 545	73
Regor Estates Ltd. v. Wright, [1951] 1 All. E. R. 219	362, 366
Rehmat-un-nissa Begam v. Price, (1917) L. R. 45 I. A. 61	26, 29
Rex v. Board of Education, [1910] 2 K. B. 165	207
Rex v. London County Council, (1929) 141 Law Times 590	215
Rex v. Munck, [1918] 1 K. B. 635	332, 342
Rex v. Port of London Authority [1919] 1 K. B. 176	215
Rex v. Wandsworth Justices, [1942] 1 K. B. 231	212
Rishindra Nath Sarkar v. Sakti Bhushan Ray, [1950] A. I. R. Calc. 512	119
Rowland Ady v. Administrator General of Burma, [1938] A. I. R. P. C. 198	253

S

S Appa Rao v. Appa Rao, [1927] A. I. R. Mad. 212	410
S. B. Trading Co. Ltd. v. Satyendra Chandra Sen, (1950) 86 C. L. J. 46	175
S. N. Banerjee v. H. S. Suhrawardy, (1927) 32 C. W. N. 10	169, 170
Sailesh Nath Bisai v. J. Chaudhuri, (1945) 50 C. W. N. 540	409
Samapuri Chettiar v. Sudarsan Chariar, (1919) I. L. R. 42 Mad. 802	193, 195
Santosh Kumar Das v. Nripendra Kumar Chowdhury, [1949] A. I. R. Calc. 430 F. B.	319, 321
Saral Chand Mitter v. Mohun Bibi, (1898) I. L. R. 25 Calc. 371	407
Sarat Chandra v. Asiman Bibi (1904) I. L. R. 31 Calc. 725	164, 168
Satyendra v. Nilkantha, [1893] I. L. R. 21 Calc. 383	164, 166
Scott v. Van Sandau, (1841) 1 Q. B. 102	74
Sennaji Kapurchand v. Pannaji Devichand, [1922] A. I. R. Bom. 276	51
Shaik Serajuddin Batley v. Province of West Bengal, Judgment of S. B. Sinha, J. dated 4th August, 1949 in Suit No. 1502 of 1948	310
Shanker Lal Mulchand v. Narayan Chandra Mullick, (1942) 47 C. W. N. 658...	274
Shiv Nath v. Bishambar Das, [1935] A. I. R. Lah. 153	275
Shoshee Shekholeswar Roy v. Haro Gobind Bose, (1883) 13 C. L. R. 356	46
Shyamchand v. Land Mortgage Bank, (1883) I. L. R. 9 Calc. 695...	408
Sibnath Banerji's case, (1945) L. R. 72 I. A. 241	223
Sikharja Nath Roy Chowdhury v. Raja Janaki Nath Roy, (1932) 36 C. W. N. 790	48
Smith v. The Chorley District Rural Council [1897] 1 Q. B. 532 and 678	225, 226
Someswar Bannerjee v. Union of India, (1950) 85 C. L. J. 364	409
Sourendra Nath Mitra v. Sm. Tarubala, (1927) 31 C. W. N. 432	48
Sree Sree Radhagobinda Deb Thakur v. Girija Prasanna Mukherji, (1931) I. L. R. 59 Calc. 186	164, 166
Sughar Singh v. Rex, (1949) 4 Dom L. R. (All.) 254	64
Sudhanya Bawali v. King-Emperor (1916) 21 C. W. N. 839	70

	PAGE.
Suhashini v. Mahendra Kumar, (1937) 51 C. W. N. 818	135
Shoobarayan v. Ramprasad, [1923] A. I. R. Nag. 241	410
Sultan v. Esuf, [1925] A. I. R. Mad. 909	411
Suraj Jan Bibee v. Banku Behary Saha, (1949) 84 C. L. J. 183	33, 35
Surendra Narain Singh v. Bhai Lal Thakur, (1895) I. L. R. 22 Cal. 752	407
Surendra Nath Roy v. Hrishikesh Saha, (1941) 46 C. W. N. 280	169, 171
Surian Singh v. King-Emperor, (1946) 48 Cr. L. J. 390	62
Sushama Roy v. A. S. M. Osman, 54 C. W. N. 491	415, 416

T

Tamplin's case, [1916] 1 A. C. 397	90
Tan Bug v. Collector of Bombay, [1946] A. I. R. Bom. 216	228
Taylor v. Faies, (1920) 124 Law Times 732	177
Thomas Chaloner v. Henry Bolchow, (1878) 3 A. C. 933	233
Tildesley v. Harper, (1878) 10 Ch. D. 393	402
Tod Heatly v. Benham, (1888) 40 Ch. D. 80	332, 341
Tukaram v. Gobinda, [1926] A. I. R. Nag. 385	410
Turner Morrison & Co. v. Monomohan Chowdhury, (1931) L. R. 58 I. A. 440; 36 C. W. N. 29	164, 167

U

Upfill v. Wright, [1911] 3 K. B. 516	332, 340
Upendra Narain Roy v. Rai Janaki Nath Roy, (1917) 22 C. W. N. 611	408

V

V. C. Kemp v. Rose, (1858) 1 Giff. 258	102
Venkata Narasimha Rao Bahadur v. Municipal Council, [1931] A. I. R. Mad. 122	215
Vishnu Ramchandra Joshi v. Ganesh Krishna Sathe, (1921) I. L. R. Bom. 1155	265

W

Walter Mitchell v. A. K. Tennent, (1925) I. L. R. 52 Cal. 677	264
Weldon v. Neale, (1887) 19 Q. B. D. 396	403
Wijeyesakara v. Festing, [1949] A. C. 646	149

The Calcutta Law Journal

VOL. 87

CALCUTTA.

1

CIVIL REVISION.

Before Mr. Justice D. N. Sinha.
DR. JATISH CHANDRA GHOSH

v.

B. K. SINHA, DISTRICT MAGISTRATE, MIDNAPORE.*

Civil.

1950.

August, 29.
September, 7.

Writ of Mandamus—Constitution, Articles 19 and 226—West Bengal Security Act 1950 (XIX of 1950 W. B. C.) section 21 (1) (b) (c) (d)—Order imposing restrictions on movement—Constitution, Article 166—Delegation of authority by the Governor—West Bengal Security Act 1950, section 38—Power of delegation, if ultra vires.—Order of restraint, if should disclose the nature of subversive act—Order, if should give details of acts not to be performed or descriptions of persons not to be associated with.

The power of delegation contained in section 38 of the West Bengal Security Act 1950 was *ultra vires* inasmuch as the power may be delegated to an officer of the lowest rank who may be wholly unfitted to exercise the powers so delegated.

The order should contain a statement as to what the subversive act was and a mere recital that a man was doing a subversive act was not enough.

Khagendra Nath De v. District Magistrate of West Dinajpur (1) followed.

In paragraph 5 of the order whereby the petitioner was prohibited from associating or corresponding with any person who is known or believed to be a member of unlawful association, there is no indication as to who such persons are and who was to know or believe them to be members of an unlawful association nor what exactly was meant by the expression unlawful association and such an order could not possibly be complied with and was not clearly an order contemplated by the Act.

Petitioner is the person served with the order of restraint.

Order under powers conferred by clauses (b), (c) and (d) of subsection (1) of section 21 of the West Bengal Security Act 1950.

The material facts will appear from the judgment.

* Civil Revision Case No. 1040 of 1950 against the order of the District Magistrate of Midnapore under section 21 (1) (b) (c) (d) of West Bengal Security Act 1950, dated 24th June 1950.

(1) (1950) 55 C.W.N. 53.

CIVIL.

Mr. M. M. Sen with Mr. Rabin Mitra, for the Petitioner.
 Petitioner.

1950.

Jatish Chandra

v.

B. K. Sinha.

Mr. Chāndrā Sekhār Sen, Senior Government Pleader, with
Mr. Smriti Kumar Ray Chowdhury for the Opposite Party.

C.A.V.

D. N. Sinha, J.

The following judgment was delivered:—

September, 7.

D. N. Sinha, J.:—This is an application under article 226 of the constitution for the issue of a writ in the nature of Mandamus directing the respondent to cancel an order passed by him dated the 24th of June 1950. The order is as follows:—

“Whereas I am satisfied that the person known as Sri Jyotish Chandra Ghosh (Dr.), son of late Umesh Chandra Ghosh of Ghatal town, P. S. Ghatal is doing subversive act.

Now therefore with a view to preventing the said person from doing such act, in exercise of the powers conferred by clauses (b), (c) and (d) of sub-section (1) section 21 of the West Bengal Security Act 1950, (West Bengal Act XIX of 1950) which I have been empowered to exercise under Government Order No. 3501-H.S. dated the 24th April 1948 read with section 40 of the said Act I hereby direct:

- (1) That the said person shall reside at his home in Ghatal Town, P. S. Ghatal, District Midnapore.
- (2) That he shall not leave the jurisdiction beyond two miles of Ghatal Municipal area P. S. Ghatal, District Midnapore without obtaining previous permission in writing of the Superintendent of Police, Midnapore.
- (3) That he shall report himself daily to the Officer-in-charge of Ghatal P. S.
- (4) That he shall not directly or indirectly organise, promote, or take part in any public meeting, demonstration or procession and
- (5) That he shall not associate himself with and correspond in writing with any person who is known or

believed to be a member of unlawful association. If he receives any written communication from any such person he shall deliver it to the Officer-in-charge of Ghatal P. S."

CIVIL.

1950.

Jatish Chandra

v.

B. K. Sinha.

D. N. Sinha, J.

The petitioner is a medical practitioner. He states that he has been practising in medicine for over 30 years, in the subdivision of Ghatal, in the district of Midnapore. He says that his practice takes him out of the limit of the Ghatal town, and in fact he is the founder of a free charitable out-door dispensary in Chandrakona Thana, which is about 15 miles away from his residence in Ghatal town and that he attends the dispensary twice every week as consulting physician. The complaint is that the Superintendent of Police of the district of Midnapore lives about 5½ miles away and it was impossible to obtain written permission in each and every case when a call was received and also it was impossible for him to visit the charitable dispensary. It is argued that the restriction is against public interest and was unreasonable and was an invasion of the petitioner's fundamental rights to practice his profession. The order complained of is under the West Bengal Security Act 1950, and has been passed under clauses (b), (c) and (d) of sub-section 1 of section 21 of the West Bengal Security Act 1950.

It is argued that the Act imposes unreasonable restrictions on the fundamental right of a citizen and is therefore bad and in any event the restrictions imposed by the order are unreasonable restrictions. It is further argued that the order has been passed by the District Magistrate of Midnapore but does not profess to be in the name of the Governor as is required under Article 166 of the Constitution. As regards Article 166 of the Constitution, it is argued by the learned Government Pleader that the order recites the notification under which the Governor had delegated his authority to the District Magistrate and therefore is a sufficient compliance with Article 166.

I do not think that it is necessary for me to decide these points, inasmuch as the order is clearly bad on two grounds which have been held to be sufficient in a decision of a divisional bench of this court, *Khagendra Nath De v. District Magistrate of West Dinajpur* (1). It has there been held that the power of delegation contained in section 38 of the Act was *ultra vires*

(1) (1950) 55 C.W.N. 53.

CIVIL.

1950.

Jatish Chandra

v.

B. K. Sinha.

D. N. Sinha J.

inasmuch as the power may be delegated to an officer to the lowest rank who may be wholly unfitted to exercise the powers so delegated. It has further been held that the order should contain a statement as to what the subversive act was and a mere recital that a man was doing a subversive act was not enough. The present order complained of purports on the face of it, to have been passed under authority delegated by section 38 of the Act and merely contains a statement that the person was doing a subversive act without any particulars thereof. The order is therefore clearly bad and cannot be supported. Apart from these grounds, I must record that the learned Government pleader has not supported paragraph 5 of the order. Under that paragraph, the petitioner was prohibited from associating or corresponding with any person, who is known or believed to be a member of unlawful association. There is no indication as to who such persons are or who was to know or believe them to be members of an unlawful association, nor what exactly was meant by the expression unlawful association. Such an order could not possibly be complied with and was clearly not an order contemplated by the Act.

There will therefore be an order that the District Magistrate of Midnapore do refrain from giving effect to the order dated the 24th June 1950, as set out in paragraph 7 of the petition.

The rule is made absolute. Respondent to pay costs of this application assessed at three gold mohurs.

S.C.

Rule made absolute.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Arthur Trevor Harries, Kt.,
Chief Justice and Mr. Justice S. N. Banerjee.*

SREENARAIN MANSINGKA

v.

AMARNATH MISHRA.*

CIVIL.

1950.

September, 6.

West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, Sec. 12(2)—Default in payment of rent—Arrears prior to the commencement.

* Appeal from Original Decree No. 85 of 1950 against the decree passed by Mr. Justice H. K. Bose, dated 2nd May, 1950.

of West Bengal Premises Rent Control Act, 1948 subject-matter of Small Causes Court suit—Arrears claimed in the rent suit decreed by Small Causes Court without interest and those arrears were never deposited with interests and costs according to section 12(2) of the Rent Act, 1948—Meaning of “payment through court”—After filing of the suit said arrears of rent deposited in Court—Effect of such deposit—West Bengal Premises Rent Control (Temporary Provisions) Act, 1950, Section 12(1), 14, and 18(5)—Subletting “a major portion”—“A major portion of the premises,” how to determine.

CIVIL.

1950.

Sreenarain Man-
singka
v.

Amarnath Mishra.

Mere deposit of arrears of rent without notice being given to landlord of such deposit would not amount to payment through Court within the meaning of Section 12(2) of the Rent Act of 1948 and would not protect the tenant from eviction.

Mere payment of decretal amount passed in rent suit filed by plaintiff landlord for arrears of rent accrued due before the Act of 1948 would not amount to payment of arrears of rent according to the Provisions of Section 12(2) of the Rent Act 1948, so as to protect the tenant from eviction. The condition precedent for stay of a suit being satisfaction of the landlord's legal claim for arrears of rent is not the same as payment under the Act which would buy protection to the tenant under the Act.

A tenant who has made default in payment of rent previous to the commencement of the Rent Act of 1950 of three periods of two months each as contemplated by Sec. 12(1) of the Rent Act of 1950, would not get any protection under section 18(5) of the Rent Act of 1950. The tenant cannot take advantage of the Rent Act of 1950 and Section 14 thereof, if he has committed default in payment of rent as contemplated by that Section.

Subletting of a major portion of the premises let to a tenant does not mean subletting a major portion of the floor area of the premises. The common sense view has to be taken of the expression “subletting a major portion of the premises.” If after taking into consideration all facts it is found that a major portion of the habitable portion of the premises has been sublet, from a commonsense point of view the tenant cannot get protection under the Rent Act. The principle being that the Act gives protection only to a occupying tenant and not to a tenant who makes profit by subletting.

Appeal by the Defendant.

Suit for ejectment.

The material facts will appear from the judgment.

Mr. Atul Gupta with Mr. T. P. Das for the Appellant.

Mr. A. K. Sen with Mr. D. K. Sen for the Respondent.

CIVIL.

The judgment of the Court were as follows:—

1950.

Sreenarain Man-
singka.
v.

S. N. Banerjee, J.—This is an appeal by the defendant from an ejectment decree passed against him on May 2, 1950, by Mr. Justice Bose sitting singly on the Original Side.

Amarnath Mishra.

S. N. Banerjee, J.

September, 6.

The defendant was a monthly tenant (according to the Bengali Calendar) under the plaintiff in respect of premises No. 50, Burtala Street, Calcutta at a rent of Rs. 240/- per month.

The defendant made default in payment of rent from 24th Magh, 1354 B.S. (7th February, 1948) to the end of Baisakh 1355 B.S. (14th May 1948) amounting to Rs. 766/- for which the plaintiff filed a suit on 19th May 1948 in the Court of Small Causes, Calcutta being suit No. 4018 of 1948; the total sum including costs claimed was Rs. 901/9/-.

The defendant also failed to pay rent for the months of Jaistha to Aswin 1355 B.S. (15th May to 17th October, 1948), amounting to Rs. 1,200/-.

The West Bengal Premises Rent Control Act of 1948 came into force on December 1, 1949, and it is not disputed that by reason of the increase allowed by the Act, the rent payable by the tenant to the Landlord from 1st December 1948 (15th Agrahayan 1355 B.S.) became Rs. 285/- per month.

The tenancy was determined by a notice to quit expiring with the month of Chaitra, 1355 B.S.

It appears that under an order of this Court dated November 17, 1948, in another proceeding relating to the premises, the defendant paid rent from Kartick to Falgoon 1355 B.S.

This suit out of which this appeal arises was brought on May 9, 1949 (26th Baisakh 1356 B.S.).

In the plaint, the plaintiff (landlord) alleges that the defendant (tenant) sub-let a major portion of the premises for more than six consecutive months without the landlord's consent and/or authority and that he had also defaulted in payment of

rent. He also referred to the suit in the Court of Small Causes, Calcutta, and claimed a decree for possession, Rs. 1,200/- for arrears of rent, mesne profits at Rs. 50/- per day from 1st Baisakh, 1356 B.S. (14th April, 1949) till delivery of possession and costs.

CIVIL.

1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

S. N. Banerjee, J.

The writ of summons was served on 13th May, 1949. On that day it appears, by consent, a decree was passed by the Small Causes Court for Rs. 901/9/- which the defendant (tenant) paid into that Court and the plaintiff took the money out of the court on 2nd June, 1949.

On 11th June, 1949, the defendant took out a notice of motion in this suit for moving the court on June 20, 1949, for making 'payment' through Court, in terms of section 12(2) of the Act of 1948. This application was moved *ex parte* on June 11, 1949, and on that day, an order was made by this Court without prejudice to the contentions of the plaintiff giving leave to the defendant to deposit with the Registrar of this Court (Original Side), the sum of Rs. 2,150/- for arrears of rent with interest thereon and a further sum of Rs. 450/- towards costs in terms of section 12(2) of the Act. A copy of the notice was served on the plaintiff on 14th June, 1949, informing the plaintiff that an order had been made by the Court giving the tenant liberty to deposit the money.

On 13th June, 1949, the tenant deposited Rs. 2,525/- in this Court. The said sum is made up as follows:—

	Rs.	As.
Arrears of rent	1,200	0
Interest	62	8
Rent from Chaitra 1355/Jaistha 1356 B.S. at Rs. 285/- per month	855	0
Interest	3	0
Costs as assessed by the Court	350	0
Registrar's commission and other charges	54	8
Total Rs.	2,525	0

The defendant filed his written statement on 16th June and on 20th June, 1949, informed the plaintiff's attorney that the deposit had been made.

CIVIL.

1950.

Sreenarain Man-
singka
v.
Amarnath Mishra.

S. N. Banerjee, J.

The learned Judge on the pleadings before him framed six issues: It is material to set out the following issues:

- (1) Should the suit be stayed under the provisions of section 12(2) of the West Bengal Premises Rent Control Act of 1948?
- (2) Is the defendant a defaulter in payment of rent as alleged in paragraphs 6 and 7 of the plaint or at all?
- (3) Has the defendant without the consent or authority in writing of the plaintiff, sub-let a major portion of the premises for more than six consecutive months?
- (4) To what relief, if any, is the plaintiff entitled?

There were two other issues framed but they are not relevant for the purpose of this judgment, as no point was made by either counsel before us on them.

The learned Judge found issues Nos. 1 and 2 against the defendant (tenant). As to issue No. 3, he said that the onus to prove that a major portion of the premises had been sub-let was on the plaintiff and he, on the evidence before him, was unable to say that the plaintiff had satisfactorily discharged the onus. On his findings on issues 1 and 2, the learned Judge refused to stay the suit and passed the decree for possession. It is against this decree that this appeal has been preferred.

The main questions that have been canvassed before us by Counsel are these:

- (1) Was there a sub-letting within the mischief of the Act?
- (2) Is the tenant entitled to have a stay of the suit by reason of the deposit he made in this Court?
- (3) If not, is the tenant entitled to relief under section 18(5) of the West Bengal Premises Rent Control Act, 1950 which was passed pending the suit which came into force on March 31, 1950.

The Act of 1950 repeals the Act of 1948 but it is not contended before us that the repeal has any effect on suits or proceedings pending on the date when the Act came into force.

CivIL.

1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

S. N. Banerjee, J.

There is no express or implied term in the Act of 1950 which affects any pending suit or proceeding.

It is admitted by Counsel for the parties before us that the rights of the parties are governed by the provisions of the Act of 1948 save that the appellant's counsel has argued that the tenant is entitled to relief under Section 18(5) of the Act of 1950.

On behalf of the respondent, it has been contended that the deposit made by the tenant does not give him any protection under the Rent Act. According to the respondent's counsel, Section 12(1) (b) refers to arrears before the commencement of the Act and Sub-section (2) provides for payment of arrears which accrued due after the commencement of the Act. Counsel contended that if rent had fallen in arrears before the commencement of the Act, the tenant could get protection only if he deposited the amount within a month as provided in Section 12(1) (b).

Counsel said in the case before us the arrears had accrued due before the commencement of the Act, and therefore, the deposit under Sub-section (2) was insufficient to give the tenant protection under the Act. Sub-section (2) is in the following terms:

"Subject to the provisions of sub-section (3), no suit or proceeding instituted against a tenant after the commencement of this Act for the recovery of possession of any premises on the ground of default in making any payment or deposit referred to in sub-section (1) shall be further proceeded with it, within one month from the date of service of process on the tenant, he pays through the court all arrears of rent allowable by this Act up-to-date together with interest thereon at the rate of 6½% per annum and such costs as the court may award."

The Sub-section contemplates the filing of a suit on the ground of default in making payment of deposit in accordance

CIVIL.

1950.

Sreenarain Man-
singka

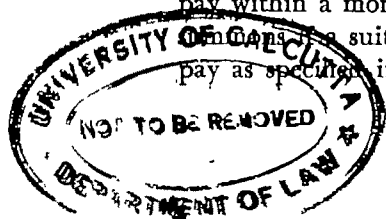
v.

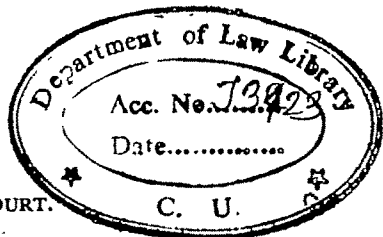
Amarnath Mishra.

S. N. Banerjee, J.

with sub-section (1). In my view, this sub-section gave a tenant a further opportunity to save himself. The scheme of the Act seems to be this. To get the benefit under the Act (a) the tenant must pay rent within the time fixed in the contract or in the absence of such contract by the 15th of the month next following that for which rent was payable; (b) if the tenant had made default and there were arrears of rent which accrued due before the commencement of the Act he could save himself by paying the arrears within a month after the date of the commencement of the Act (December 1, 1948) and interest on the arrears at 6½ per cent per annum, if they were already subject matter of a suit, proceeding decree or order; (c) if the amount of rent had been increased by the Controller, the tenant must pay it within the time specified by the Controller. If the time had not been specified by him, then within a month from the date of such order. In certain cases, the tenant might deposit the rent within the time and in the manner provided in Section (19) (d) if the tenant had failed to make payment or deposit as provided in Sub-section (1), he could only get the protection under the Act if he paid or deposited the amount referred to in Sub-section (2) in the manner therein provided. In other words, the suit for possession was stayed if the tenant paid within a month from the date of the service of the summons (i) arrears of rent to the full extent allowable under the Act, (ii) interest thereon at 6½ per cent per annum and (iii) such costs as the court might award. This sub-section is subject to one condition, namely, that if there was a failure to pay rent for three consecutive months, the interest of the tenant was *ipso facto* determined and he was no longer deemed to be a tenant. Therefore, obviously, he was unable to make any payment under Sub-section (2) and get the suit stayed or the protection of the Act.

The Scheme of sections 11 and 12 seems to us to be pretty clear. The Act says to the tenant: pay rent regularly and occupy the landlord's premises. It says to him 'You cannot go on living in the landlord's premises without regularly paying the rent. If you have fallen into arrears, the Act gives you a chance to pay off the arrears within a month from 1st December, 1948. If you do so, you would not be ejected. Even if you make default there, still the Act gives you another chance namely, to pay within a month from the date of the service of the writ of possession if a suit for ejectment has been instituted; and if you pay as specified in sub-section (2) the suit will be stayed. You





VOL. 87.]

HIGH COURT.

C. U.

11

have to pay interest and costs as provided in sub-section (1) (b) and sub-section (2) of Section 12.' In other words, if the arrears of rent is the subject matter of a suit or proceeding, decree or order, it will carry interest. This seems to me the scheme of the act.

Civil.

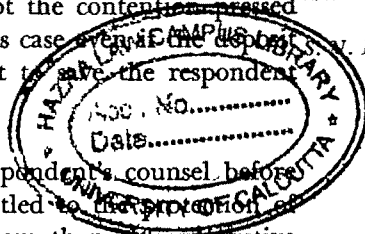
1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

We are, therefore, unable to accept the contention pressed on behalf of the respondent that in this case even if the disputes were otherwise good it is not sufficient to save the respondent from eviction.



S. N. Banerjee, J.

The next point argued by the respondent's counsel before us was that the appellant was not entitled to the protection of the Rent Act as he had sub-let for more than six consecutive months a major portion of the premises without the authority or consent of the landlord so to do.

LP1894

On behalf of the appellant it has not been denied that there is sub-letting by the tenant. It is not denied that the sub-letting has been for more than six consecutive months. But it is denied that the sub-letting has been of a major portion of the premises. This point was very strenuously contested by both counsel.

Before the learned trial judge a number of witnesses including sub-tenants were examined on behalf of the plaintiff. It is clear from the evidence that out of 48 rooms including kitchen, 11th rooms are in the possession of the tenant and the rest have been sub-let to various sub-tenants.

Anil Kumar Das Gupta, an Assessment Inspector of the Corporation of Calcutta, was called as witness on behalf of the plaintiff. Before he came to the witness box he gave a proof of his deposition to the plaintiff's attorney. But in the witness box he gave evidence contrary to the statement he had already made to the plaintiff's attorney and his evidence was in favour of the defendant. It was quite clear from his evidence that the witness was giving evidence against the party who had called him. Counsel for the plaintiff thereupon asked the learned Judge to permit him to put questions to the witness which might be put in cross-examination by the adverse party. The learned judge in his discretion permitted counsel to put such question. This witness admitted before the Judge that more than half the

CIVIL.

1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

S. N. Banerjee, J.

premises had been sub-let. The learned Judge however on the evidence before him on this issue held that though the evidence of the witnesses established that a large number of rooms had been sub-let to tenants, there was no definite evidence before him as to the actual area sub-let. He took the view that the onus to prove the mischievous sub-letting was on the plaintiff and that he had not satisfactorily discharged the onus. The learned Judge on the evidence before him held that the plaintiff had not succeeded in proving that there had been sub-letting of the major portion of the premises and he decided this issue in favour of the defendant. We are, however, not disposed to take the view the learned Judge has taken.

There is abundant evidence to show that the tenant has sub-let a major portion of the premises. Out of 48 rooms he has retained only 11 and the rest he has sub-let. But then the question arose as to what was the true meaning of the expression 'major portion of the premises.' Is the Court to go by the floor area or the value of the portion sub-let? What is the test to be applied? If one goes by the floor space or by value, it would sometimes lead to illogical results. Suppose there is a four-roomed house built on a cottah of land with a compound of a bigha of land. The landlord lets the house with the compound to a tenant. In the Act, premises include the gardens and out-houses appertaining to the building let. The tenant sub-lets the house only but retains the ground. Does he come within the mischief of the Act? Or again, take the case of the tenant keeping the house to himself and sub-letting the garden to a sub-tenant. Will he or will he not come within the mischief of the Act. Take another illustration. Suppose a house consists of four rooms, one of which has a marble floor and is fitted with all modern comforts. Assume its value to be much more than the rest of the house and this room only is sub-let to a tenant. Would it be said that there has been sub-letting of a major portion of the premises let? Many questions like these can be framed and answers to such questions, one way or the other would be bizarre.

It has been contended on behalf of the appellant that we must go by the floor space. But why should we not go by the cubic space? Cubic space for the purpose of living in a room is more important than the floor space. I think the correct way of looking at the matter is, as my Lord the Chief Justice pointed

out in the course of the argument, that we should take a common sense view of the matter.

CIVIL.

1959.

If, after taking into consideration all the circumstances of the case, it can be said, as in ordinary parlance, that a major portion of the habitable portion of the premises has been sub-let, the tenant comes within the mischief of the Rent Act and is not entitled to its protection.

Sreenarain Man-
singka
v.
Amarnath Mishra.

S. N. Banerjee, J.

In the case before us, having regard to the finding of the learned Judge and the controversy raised before us we by consent of parties directed an Engineer of this town who is in the register of the Court to measure the floor area and make a report. The material portion of the report is as follows:—

	Ground floor.	1st floor.	2nd floor.	3rd floor.	Total.
Tenant (Appellant) ...	629	109	658	152	1548
Sub-tenants ...	747	1345	553	1013	3658
Disputed ...	x	x	232	x	232
	1376	1454	1443	1165	5438

The Engineer took the measurements in the presence of the representatives of the parties. He took the measurements also of the courtyard, covered passages, gangways and the terrace in the several floors. The passages and gangways give access to the different rooms in each floor. They are in the use of all the occupants as they are the only access to the different rooms in each floor. The open terrace of a floor is used by the tenants of that floor. There are also two privies (area 32 Sq. ft.) one urinal and a staircase in each of the floors which are used by the sub-tenants of the respective floors. It is argued on behalf of the appellant that in deciding whether a major portion has been sub-let, the Court must exclude the courtyard, the passages, the gangways and the terrace. Counsel for the appellant said that these had not been sub-let, they were not within the ambit of the contract of tenancy. Yet, the sub-tenants have the user of them. It seems to me to be a curious position that the sub-tenants would have the benefit of them but they are to be excluded from our consideration in deciding as to whether a major portion of the house has been sub-let.

CIVIL.

1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

S. N. Banerjee, J.

It appears that the tenant (defendant) has in his possession 1548 Sq. ft. and the sub-tenants have in their possession 3658 Sq. ft. excluding the passages and the gangways.

We are unable to take this extreme view urged by appellants' counsel as to how the portion sub-let should be determined for the purpose of the Act.

Assuming, however, we exclude the passages, gangways and the courtyard, we cannot exclude the terrace. If a room has been sub-let, certainly the terrace over it has been sub-let. If we exclude the passage etc., but include the terrace there would still be a sub-letting within the mischief of the Act. But I do maintain, as my Lord the Chief Justice pointed out, that we must take a common sense view of the thing and look at the matter broadly. We have to make up our mind as ordinary people do it, as to whether there has been a sub-letting of the major portion of the premises in the ordinary sense in which people understand it and we have no doubt that Anil Kumar Das Gupta, the Assessor of the Corporation took the same view and said that more than half the portion of the premises had been sub-let.

The defendant has not given evidence. He has not produced his books of account to show what rent he realised from the sub-tenants. There are a large number of sub-tenants and there is no doubt in our mind that there are books and papers which would show what rent is realisable by the sub-tenants. He did not disclose his books and papers in his affidavit of documents. He has not helped the Court in any way. Why did not the defendant come to Court? Obviously he was afraid to face the cross-examination and we are bound to draw the inference that if the defendant had given evidence, it would have been unfavourable to him.

There is abundant evidence in this case that the tenant has sub-let a major portion of the house. Out of 48 rooms the tenant has retained only 11 and the rest he has sub-let. Thus a major portion of the habitable accommodation is in possession of the sub-tenants.

The Scheme of the Act is to protect a bona-fide tenant who requires the premises for his own use and not to protect the

tenant who by sub-letting a major portion of the premises makes profit out of it. If it is merely a case of profit, the landlord should get the profit. He is the owner of the house. The tenant's right cannot be substituted for the ownership of the landlord. Having regard to the paucity of accommodation in Calcutta, the legislature has intervened and has enacted the Rent Act. The act says that if a tenant bona-fide requires the premises which he occupies for his own occupation he would be protected from eviction so long as he pays rent in the manner provided in the Act. In this case, there is no doubt in our mind that the tenant by sub-letting the rooms has been making a large profit and to conceal that profit, he has not disclosed the books of account.

CIVIL.

1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

S. N. Banerjee, J.

On the facts of this case and on the considerations aforesaid, we hold against the tenant and we find it as a fact that the tenant has sub-let a major portion of the premises within the meaning of the Act and is not entitled to its protection. As he was duly served with a valid notice to quit, the decree for possession must be sustained.

This finding is sufficient for the disposal of the appeal but having regard to the fact that other points have been argued before us, we consider it proper to record our reasons on these points.

I have already said that under leave given by the Court on 11th June, the tenant has deposited Rs. 2,525/- in court. That deposit was made on 13th June, and the information that the money had been deposited was given for the first time on 20th June, to the plaintiff's attorney.

It has been argued on behalf of the respondent that the amount deposited is not sufficient for the purpose of section 12(2) as it does not cover the interest on the amount which the tenant deposited in the Court of Small Causes, Calcutta and which the landlord withdrew.

On the other hand, on behalf of the appellant, it has been contended that in as much as the decree was by consent and the tenant deposited the money into Court and the landlord took it out, he was not entitled to any interest on the money deposited there and taken out by him. According to Counsel no interest

Civil.

1950.

Sreenarain Man-
singka

v.

Amarnath Mishra.

S. N. Banerjee, J.

was payable on that sum and therefore, the amount deposited in this Court was sufficient for the purpose of sub-section (2) of section 12 of the Act 1948. In other words, according to Counsel for the appellant, the right amount has been deposited.

We do not think the appellant's contention on this point is right. The landlord filed the suit in the court of Small Causes for rent. The tenant submitted to a decree and deposited the amount decreed as he was entitled to under Or. 21, r. 1 of the Code of Civil Procedure. All money payable under a decree may be paid into the Court whose duty it is to execute the decree and where such payment is made, notice of the payment is given to the decree holder. That notice is given so that the decree holder may take out the money. In the Small Causes Court when the landlord took out the money, he never said that he gave up interest that was payable under Sub-section (2) of Section 12 of the Act of 1948. At the time when the money was deposited in the Small Causes Court, the suit in this Court was pending and the question of interest never arose and could arise in the Small Causes Court.

Interest under Sub-Section (2) is payable as a condition for stay. It is a statutory interest given to the landlord by the legislature as compensation for his having had to file a suit to recover his legitimate dues. It may be noted that Section 12(x) (b) also contemplates payment of interest. If the tenant paid the arrears under section 12(1) (b) within a month after the date of the commencement of the Act he had not to pay any interest on the arrears but where the arrears were already the subject matter of a suit or proceeding before a Court or of any decree or order of court, interest was payable.

What is there in sub-section (2) to suggest that the interest is not payable merely because the landlord took the money which the tenant had deposited and had the right to deposit under Or. 21 r. 1 of the Code of Civil Procedure. That rule gives the judgment-debtor the right to satisfy the decree by making payment into Court. I do not see how such a right conferred on the judgment debtor could deprive the landlord of his statutory right to get interest under Sub-section (2) of Section 12 of the Act of 1948. The Court has been given jurisdiction to stay a suit on certain conditions and these conditions are stated in Sub-section (2). If the conditions are not fulfilled, the Court

can have no jurisdiction to stay the suit. The rights of the parties in my view crystallise at the date of the institution of the suit. The words in Sub-section (2) are clear. If a suit is instituted against the tenant for the recovery of possession of any premises on the ground of default in making any payment of deposit referred to in Sub-section (1).....". The suit is instituted by the landlord against the tenant for eviction when the tenant has lost his protection under the Rent Act by reason of his failure to pay rent according to the contract or otherwise as provided in the Act. At the date when the suit is instituted, there are the arrears and at that point of time, the tenant has no protection whatsoever under the Act; he has defaulted in making payment of rent as it became due. This suit if the tenant wants it to be stayed, can be stayed, therefore, if the tenant pays all arrears of rent with interest thereon. The word arrears must be construed with reference to the date of the institution of the suit. The subsequent payment of arrears in the circumstances as I have stated above cannot exonerate the tenant from his liability to pay interest in terms of sub-section (2). There is another point of view from which problem can be looked at. At the date of the consent decree, the arrears were the subject matter of a suit, namely, the suit in the Small Causes Court. Therefore, interest on it was payable under Section 12(1) (b). There is nothing in our view in Sub-section (2) which deprives the landlord of his right to get the statutory interest. If the deposit in the Court of Small Causes, Calcutta, is looked upon as a deposit within the meaning of the Act, even so, interest is payable on the arrears.

At one stage of the argument, it was admitted before us on behalf of the appellant that interest on the amount decreed by the Small Causes Court had not been paid because no interest was payable. We are of opinion that argument is not sound for the reasons given above. But then learned Counsel for the appellant advanced an alternative argument and that was this: Assuming that the deposit would carry interest, the money deposited by the tenant in this Court is sufficient to cover the interest.

Assuming that to be so, had the tenant paid the amount within the time specified in Section 12(2)? That depends on the meaning to be given to the words 'pay through the Court' in sub-section (2). According to the learned Counsel for the

CIVIL.

1950.

Sreenarain Man-
singka.

v.

Amarnath
Mishra.

S. N. Banerjee, J.

CIVIL.

1950.

Sreenarain Man-
singka.
v.
Amarnath
Mishra.

appellant the word pays in the expression pays through the Court means deposits. In other words according to the learned Counsel if the right amount is deposited into Court, within the month specified in the sub-section, the suit must be stayed. According to him mere deposit of the amount without anything more is sufficient for the stay of the suit.

It should be observed that Section 12 contemplates payment as also deposit. Sub-section (1) (b) speaks of payment but Sub-section (c) contemplates deposit. "Where the landlord refused to accept any rent referred to in clause (a), clause (b) or clause (c).....unless the tenant deposits such rent and all subsequent rent allowable by the Act which becomes due in respect of such premises as provided in Section 19....." the tenant is not entitled to the protection of the Act.

Now turning to Section 19 of the Act, we find in sub-section (2) (b) that the deposit has to be made: "within a fortnight of the date on which such rent becomes due or from the expiry of the time within which such rent is required to be paid under Clause (a), Clause (b) or Clause (c) of Section 12, as the case may be, in the same manner as has been prescribed for the deposit of rent under Sub-section (1)."

It should be observed that in the Act throughout a distinction is made between 'payment' and 'deposit'. Section 19(2) (b) emphasises that distinction. It says rent which is required to be 'paid' may be 'deposited'.

We are, therefore, unable to hold that the word 'pays' in the expression 'pays through the Court' means 'deposits' simpliciter, in Court. If it were the intention of the legislature that 'pays' means 'deposits' the legislature could have easily used the word 'deposit'. It has done so in the other parts of the Act where it became necessary. It has used the word in Section 12 itself. We, therefore, cannot accept the argument of the learned Counsel that mere deposit without anything more is sufficient compliance with the provisions of Sub-section (2) of Section 12.

Turning to the Civil Procedure Code, we find in Order 24 provision for payment into Court. Rule 1 provides for deposit by the defendant of the requisite amount in satisfaction of the

Civil.

1950.

Sreenarain Man-
singka.

v.

Amarnath
Mishra.

S. N. Banerjee, J.

plaintiff's claim. Rule 2 provides for notice of deposit. Rule 3 provides for notice of deposit. Rule 3 provides that interest on deposit is not to be allowed after notice to the plaintiff. In other words, if notice is given to the plaintiff that the amount has been deposited, no interest is allowed to him on the sum deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.

It is contended on behalf of the respondent that the word 'pay' in 'pays through the Court' means actual payment to the landlord. The respondent's Counsel argues that the money has to be deposited into Court and it is only when the money is taken out of it by the landlord that payment is made to him. According to respondent's counsel 'pays through the Court' means 'actual payment into the hands of the landlord by depositing the money in Court and that must be done within the time specified in Sub-section (2). In other words, not only the deposit but the actual payment—both these acts—are to be done within the month and then and then only can the tenant get the protection of the Act; otherwise, he says there is no compliance with the provision of Sub-section (2). This argument of the learned Counsel for the respondent will lead to a serious difficulty. Suppose the money is deposited within 5 days from the service of the writ of summons and for some reason or other for no default of the landlord he does not receive it until after the expiry of a month from the date of the service of the summons. Is the tenant to be deprived of the protection of the Act? We do not think so. The tenant has deposited the money. There was no default on his part. The landlord was not in default either. He has not been able to take the money out before the expiry of the month. We do not think the intention of the legislature was that the right of the tenant would be jeopardised in a contingency like this.

The learned Counsel for the respondent argues that unless 'pays through the Court' means actual payment to the landlord, the landlord would suffer injury: in order to take the money out of the Court the landlord has to incur expenses: Therefore, it may, in some cases, be that he does not receive the actual amount of arrears and interest by reason of his having had to incur expenses for withdrawing the money out of the Court. But to that the answer is very simple. Section 12(2) of the Act

CIVIL.

1950.

Sreenarain Man-
singka.

v.

Amarnath
Mishra.

S. N. Banerjee, J.

says that tenant has also got to pay such costs as the Court may award. A discretion has been given to the Court to fix the amount and no doubt, the Court when it gives leave to the tenant to deposit the amount will take this matter also into consideration. Once the Court fixes the amount and the costs to be deposited, there is no question of default either of the landlord or the tenant. The tenant deposits the amount which has been fixed by the Court. Therefore he is not at fault.

We think therefore that once the court has given leave to deposit the amount with the requisite interest and costs which the court has awarded, and that sum is deposited in court by the tenant on notice to the landlord within a month from the service of the writ of Summons, the tenant is entitled to the protection of the Act. We hold that the actual payment to the landlord is not pre-requisite under sub-section (2). It will be quite enough if within the month, the deposit is made on notice to the landlord.

In this case, the notice was not given to the landlord within the month. The first notice which the landlord's attorney received was the notice of an intention of the tenant to deposit the money and that was given on 14th June, that is to say, a month after the date of the service of the summons. The summons was served on 13th June. The fact that the deposit had been made was brought to the notice of the landlord's attorney on 20th June after some correspondence. Therefore in this case we are bound to hold that the deposit was not made within the time specified in Sub-section (2) of Section 12 of the Act of 1948. The tenant, therefore, is not entitled to have the suit stayed and we think that the learned Judge's judgment is right and we must dismiss the appeal.

The appellant's counsel asked us to grant relief under Sec. 18(5) of the West Bengal Premises Rent Control (Temporary Provisions) Act of 1950. That sub-section runs as follows:—

"If at the date when this Act comes into force, a suit for ejectment of a tenant is pending whether in trial Court or in Court of first or second appeal in which no decree for ejectment would be passed except on the ground of default in payment of arrears of rent under the provisions

of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, the Court shall exercise the powers of granting relief against ejectment given by Section 14 of this Act following the provisions and procedure of that Section, as far as may be necessary, and for the said purpose shall make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be necessary or just."

Civil.
—
1950.
Sreenarain Man-
singka.
v.
Amarnath
Mishra.

S. N. Banerjee, J.

Section 14 defines when a tenant gets the benefit of protection against eviction. Sub-sections (1), (2) and (3) of section 14 have an important proviso and that is this:

"The tenant shall not be entitled to the benefit of protection against eviction under this Section if he makes default in payment of the rent referred to in Clause (i) of the proviso to Sub-section (1) of Section 12 on three occasions within a period of eighteen months."

Section 12(i) is as follows:—

"Subject to the provisions of section 14, where the amount of two months' rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract, or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with section 19."

It is not argued by the appellant's counsel that there has been no breach as contemplated in the proviso I have referred to of Section 14, but what is sought to be argued is that even so, the tenant is entitled to relief contemplated in Section 18(5) by reason of the fact that the tenant was a statutory tenant under the Act of 1948 and therefore, he must get also all the benefits of the Act of 1948. In spite of the fact that this point of law has been argued by an eminent Counsel, we are unable to accept the contention. The plain meaning of Section 18(5) of the Act of 1950 is this: If you want the relief, you must come within the four corners of Section 14. You must show that you have complied with the provisions of the Act of 1950, which enables you to ask for the relief to be given and which confers jurisdic-

CIVIL.

1950.

Sreenarain Maris-
singka.

v.

Amarnath
Mishra.

S. N. Banerjee, J.

tion on the Court to grant the relief. The tenant cannot combine the Act of 1948 with the Act of 1950 for the purpose of getting the relief. The tenant cannot be allowed to fall back upon a portion of the Act of 1950 and of another portion of the Act of 1948. The 1948 Act has been repealed by the 1950 Act.

We are, therefore, unable to grant relief to the appellant under Section 18(5) of the Act of 1950.

The appellant has failed and there must be an ejectment. The decree of the learned Judge stands. The respondent is entitled to full costs here and in the court below.

We set aside the order as to costs made by the learned Judge.

The appellant has asked for stay of execution. On the facts of the case, we see no reason why a stay should be granted. The appellant says that he would appeal to the Supreme Court and so the execution of the decree should be stayed. The appellant may act in such manner and take such proceedings as he may be advised but the fact that he would prefer an appeal does not by itself entitle him to have stay of execution. Having regard to the facts of the case, we are unable to accede to the prayer of the appellant for stay of execution. The stay is refused and the respondent will be entitled to execute the decree in the usual way.

Certified for two counsel.

Harries, G. J.:—I agree.

Messrs. P. D. Himmatsingka & Co.: Solicitors for the Appellant.

Messrs. N. C. Boral & Pyne: Solicitors for the Respondent.

Appeal dismissed:

S.K.R.C.

Order for Costs set aside.

Before Sir Arthur Treoor Harries, Kt., Chief Justice
and Mr. Justice S. N. Banerjee.

CIVIL.

1950.

November, 28.

MEHTABCHAND DHANDIA

v.

SHRIRATAN MOHTA.*

*Abatement of suit.—Civil Procedure Code, (Act V of 1908), O. 22, r. 9 (2)—
what is "sufficient cause."—Medical certificate when admissible in
evidence.*

Order 22, Rule 9(2) of the Civil Procedure Code gives the plaintiff an opportunity to make an application for setting aside an abatement but the condition is that he must satisfy the Court that he was prevented by any sufficient cause from continuing the suit.

What is sufficient cause depends on the circumstances of each case. But one thing is clear that the Court though does not apply too exacting a standard of diligence, if there is a delay which in the circumstances of the case the court thinks unreasonable, the Court does not exercise the discretion conferred on it under Order 22, Rule 9(2).

Medical certificate is not strictly admissible in evidence. The statements must be verified by somebody.

Suit for redemption of certain jewellery.

The material facts will appear from the judgment.

Mr. A. N. Sen for the Appellant.

Mr. P. Mallick with Mr. B. Choudhury for the Respondent.

The judgments of the Court were as follows:—

S. N. Banerjee, J.:—This suit was filed on August 14, 1945 for redemption of certain jewellery. The written statement was filed on or about November, 19, 1945. The defendant died intestate on December, 15, 1919, leaving him surviving a widow, Sm. Tarabai and two sons, Sri Ratan and Brij Ratan as his heirs and legal representatives.

November, 28.

* Appeal from Original Order No. 117 of 1950.

CIVIL.

1950.

Mehtab Chand
Dhandia

v.

Shriratan
Mohta.

Banerjee, J.

On December 16, 1949, the plaintiffs attorney was informed of the death and on December 20, 1949, the names of the heirs and legal representatives of the deceased were furnished to the plaintiffs attorney. On January 4, 1950, the plaintiffs attorney wrote to the defendant's attorney that he had "written to his client for information." On February 28, 1950 the plaintiffs attorney wrote to the defendants attorney asking for information about the date of the death of the defendant. That was duly supplied. On March 20, 1950, the defendants attorney wrote to the plaintiff's attorney that the suit had abated. To that the plaintiff's attorney replied: "I have now been instructed to make the necessary application to the Court." The notice of motion of the application out of which this appeal arises was taken out on May 8, 1950 and the application for setting aside the abatement was moved before Bachawat J. on May 10, 1950 when it was noted as made on that day. The application was heard on May 23, 1950 and was dismissed by his Lordship. No judgment was delivered. The petition in support of the notice of motion is not verified by the petitioner himself but by one Janaki Nath Roy who is a clerk in the employ of the plaintiff's attorney. The relevant paragraph in the petition is paragraph 8 in which it is stated that the petitioner on that date, namely, the date when the petition was affirmed, was at Jaipur: he was informed of the death of the defendant on or about December 22, 1949 and "as your petitioner has been suffering from rheumatism the application for recording the death, the substitution of the defendants and the consequent amendment of the plaint as aforesaid could not be made within 90 days from the said 15th December 1949." This paragraph is verified upon information received from the plaintiff. When we asked Counsel for the plaintiff as to how that information was received he said that a relation came from Jaipur and gave information, a story which is often said in Court but which is never believed unless there is corroborative evidence. In this case there is no such evidence.

In the affidavit in reply the plaintiff sets out a medical certificate which runs as follows:

"This is to certify that Setji Mehtab Chand Dhandia (Plaintiff) is suffering from chronic rheumatoid arthritis of the knee-joints and that he is not fit to get about for the present (for about a month). He is advised complete rest and adequate treatment."

The certificate is not strictly admissible in evidence. The statement in the certificate has not been verified by anybody. But assuming that we take the certificate into consideration—what information does it convey to Court? The information conveyed is that the plaintiff was suffering from chronic rheumatoid arthritis. It does not say that he was unable to verify a petition. All that the certificate says is that he was not fit to get about, which we understand means that he was not fit to walk about. But the plaintiff's attorney had all the informations he required for a petition for substitution. He could make the petition ready and send it to Jaipur to be verified by the petitioners, but that was not done. We cannot see how his illness could prevent the plaintiff from continuing the suit. After 90 days, the Code of Civil Procedure says that the suit abates and Or. 22 r. 9(2) gives the plaintiff an opportunity to make an application for setting aside the abatement; but the condition is that he must satisfy the Court that he was prevented by any sufficient cause from continuing the suit. It is then and then only that the Court sets aside the abatement. What is sufficient cause is difficult and undesirable to attempt to define precisely. It depends on the circumstances of each case. But one thing is clear that the Court though does not apply too exacting a standard of diligence, if there is a delay which in the circumstances of the case the Court thinks unreasonable the Court does not exercise the discretion conferred on it under Or. 22 r. 9 sub-rule (2). In this case in my view the plaintiff has not shown sufficient cause. In fact he has not shown any cause at all. He says that he was suffering from a chronic illness. That did not prevent him from continuing the suit. The delay therefore has not been explained at all and we are disposed to take the view that the plaintiff has been dilatory in the conduct of the suit. The learned Judge has exercised a discretion in the matter and we think he has exercised his discretion rightly.

The appeal, therefore, is dismissed with costs.

Harries, C. J.:—I agree.

Mr. J. N. Rakhit: Solicitor for the Appellant.

Messrs. Chowdhury & Chowdhury: Solicitors for the Respondent.

S.K.R.C.

*Appeal dismissed
with costs.*

Civil.

1950.

Mehtab Chand
Dhandia

v.

Shriratan
Mohta.

Banerjee, J.

Before Sir Arthur Trevor Harries, Kt., Chief Justice and
Mr. Justice S. N. Banerjee.

MAHADEO PROSAD RUNGTA

v.

SM. LUXMI DEBI AND OTHERS.*

Civil.

1950.

August, 16.

Appeal—Dismissal of suit—High Court Original Side Rules—Chapter 10 Rule 35, suit dismissed under—Discretion of the Judge, if can be interfered with.

A suit was filed by plaintiff appellant on June 2, 1947; writ of summons was served on defendants Nos. 1 and 2 on June 14, 1947, on defendant No. 4 on August 9, 1947 and on defendant No. 3 on September 13, 1947. The plaintiff took out a summons for discovery against defendants Nos. 1 and 2 on January 15, 1949 and inspection taken in July 1949. In March 1949 the plaint was amended.

On May 31, 1950 a notice was received by the plaintiff to the effect that the suit was to be placed in the Special List and would be dismissed for default unless good reasons were shown to the contrary and the suit was thereafter dismissed.

Held—Whether a suit placed in the Special List should or should not be dismissed for default is within the discretion of the presiding Judge.

Kumar Srinivas Prasad Singh v. Keshava Prasad Singh (1) followed.

The appellate Court would be loath to interfere with this discretion unless it was satisfied that the learned Judge had acted capriciously or in disregard of any legal principle.

Rehmat-un-nissa Begam v. Price (2) relied on.

The application of the principle that before proceeding under Chapter 10 Rule 35 of the Original Side Rules the Court, in a case of inordinate delay by the plaintiff, should challenge the laggard plaintiff to set down

his case at once and proceed to trial without delay according to the rules without dismissing the suit, must depend upon the facts of each case but a mere offer by the plaintiff to set down the case for immediate trial was by no means the determining factor.

* Appeal from Original Order No. 95 of 1950 from the order passed by S. R. Das Gupta, J. in Original Suit No. 1427 of 1947.

(1) (1935) L.R. 63 I.A. 12.

(2) (1917) L.R. 45 I.A. 61.

Dawoodayal Kothari v. Shibnath Roy Burman (1) and *Pravash Chandra Dutta v. Santhal Pargana Electric Supply Corporation Ltd.* (2) referred to.

CIVIL.

1950.

Mahadeo. Prosad
Rungta.

v.

Plaintiff is the Appellant.

Suit for declaration that a partnership stood dissolved on and from June 3, 1946 and alternatively for dissolution of the Sm. Luxmi Debi. partnership and that certain transfers were null and void.

Harries, C. J.

The material facts will appear from the judgment.

Mr. A. K. Sen for the Appellant.

Messrs. E. R. Meyer and S. Sen for the Respondents.

The following judgments were delivered:—

Harries, C. J.:—This is an appeal from an order of S. R. Das Gupta, J. dismissing a suit preferred by the appellant for want of prosecution under the provisions of Ch. 10 r. 35 of the Rules of the Original Side of this Court.

August, 16.

The Rule in question is in these terms:—

"Suits and proceedings which have not appeared in the prospective List within six months from the date of institution, may be placed before a Judge in Chambers, on notice to the parties or their attorneys, to be dismissed for default, unless good cause is shown to the contrary, or be otherwise dealt with as the Judge may think proper."

The suit in question was filed by the Plaintiff-appellant on June 2, 1947. In the suit there was a prayer for a declaration that a partnership under the name and style of Vishnupur Rice Mill and Oil Mills stood dissolved on and from June 3, 1946; alternatively there was a claim for dissolution of the partnership for a declaration of the shares of the parties and for a further declaration that certain transfers were null and void.

On June 14, 1947 the writ of summons was served on Mr. B. M. Bagaria, attorney for defendants Nos. 1 and 2. On

(1) (1942) 46 C.W.N. 653.

(2) (1944) 48 C.W.N. 640.

CIVIL.

1950.

Mahadeo Prosad

Rungta.

v.

Sm. Luxmi Debi.

Harries, C. J.

August 9, 1947 the writ of summons was served on defendant No. 4 and on September 13, 1947 on defendant No. 3.

On June 3, 1947 an application was made on behalf the plaintiff for an interim order that the official Receiver be made receiver *pendente lite*, and on July 18, 1947, the Official Receiver was so appointed.

On July 25, 1947 a written statement was filed on behalf of defendants Nos. 1 and 2. Defendants Nos. 3 and 4 never entered appearance to the writ of summons and therefore were not in a position to contest the suit.

Nothing was then done for over a year when Hardwarimal Jhunjhunwalla, defendant No. 3 died and on September 8, 1948, an application was made to substitute the deceased man's widow on the record, and this appears to have been done.

There was then considerable delay but on January 15, 1949 the plaintiff took out a summons for discovery against defendants Nos. 1 and 2 and on January 21, 1949 an order for discovery was made which was to take effect within three weeks. Inspection, however, we are told, was not taken until July 1949. In March 1949 the plaint was amended. Nothing more was done in connection with this suit and on May 31, 1950 a notice was received by the appellant to the effect that the suit was to be placed in the Special List and would be dismissed for default unless good reasons were shown to the contrary. I may mention that all suits placed before a Judge under Ch. 10, r. 35 are placed every week in a list known as the Special List.

The matter came before S. R. Das Gupta, J. and an affidavit was filed on behalf of the appellant by a clerk of Messrs. Khaitan & Co., who were the appellant's solicitors. That affidavit merely set out the history of the case and in paragraph 16 it is stated that the plaintiff himself could not make and affirm the affidavit because at the moment he was lying ill. It is to be observed that this paragraph is based on information which the deponent is said to have received. The affidavit however is totally silent as to the reasons for the inordinate delay in proceeding with this suit. As I have pointed out more than a year elapsed after the written statement before any further step was taken, and the

step which was taken was necessitated by the death of one of the defendants who had not entered appearance. About four months afterwards an application was made for discovery and it took over six months for the inspection to take place. Had the matter rested there, we should have been inclined to take a more lenient view. But after inspection in July 1949 practically a year elapsed when nothing whatsoever was done and possibly nothing would have been done but for the fact that this notice was served on the appellant to show cause why the suit should not be dismissed for default.

CIVIL.
—
1950.
—
Mahadeo Prasad
Rungta.
v.
Sm. Laxmi Debi.
—
HARRIES, C. J.
—

Whether a suit placed in the Special List should or should not be dismissed for default is within the discretion of the presiding Judge, and on behalf of the respondents it has been urged before us that we should not interfere with the discretion of the learned Judge who has dismissed this suit.

That the matter is one of discretion is clear from the case of *Kumar Srinivas Prasad Singh v. Keshava Prasad Singh* (1) at page 19 Lord Thankerton who delivered the judgment of their Lordships of the Privy Council observed:

".....it is clear that the appellant must satisfy this Board that both the Courts below have failed to exercise their discretion properly. Unless the appellant succeeds in that task, this Board will not be willing to disturb the conclusions of the Courts below."

As the matter was one in the discretion of the learned judge an appellate Court would be loath to interfere with that discretion and indeed it could not interfere unless the Appellate Court was satisfied that the learned Judge had acted capriciously or in disregard of any legal principle. The right of an appellate court to interfere with the discretion of a court below was considered by their Lordships of the Privy Council in *Rehmat-un-nissa Begam v. Price* (2). At page 66 Sir Lawrence Jenkins who delivered the judgment of the Board observed:

"Their Lordships therefore are unable to affirm the decision of the appellate Bench as to the competence of the suit. But this leaves open the question whether the Court's discretion should be exercised for or against the Nawab's

(1) (1935) L.R. 63 I.A. 12.

(2) (1917) L.R. 45 I.A. 61.

CIVIL.

1950:

Mahadeo Prosad
Rungta.

v.

Sm. Luxmi Debi.

Harries, C. J.

claim. The appellate Bench decided adversely to it, and it was urged in argument against the interference with this decision that it is opposed to sound practice for an appellate Court to substitute its discretion for that of the Court from which an appeal has been preferred. The justice of this argument is undoubted, but it was at least as relevant before the appellate Bench as it is before this Board. And yet the appellate Bench did not hesitate to express its readiness to substitute its discretion for that of the Original Court, although in the view it took of the Courts jurisdiction the question could not arise.

In these circumstances the real question is whether there was or is any justification for questioning or disturbing the discretion exercised by the original Court when it passed the decree for dissolution in the Nawab's favour. It cannot be said that the Court acted capriciously or in disregard of any legal principle in this exercise of its discretion. On the contrary, there are elements in the case which can fairly be regarded as ample warrant for the first Court's decision, and for this it is enough to point to the dual position of the defendants, which brought their interests as contractors into sharp conflict with their duties as partners of the Nawab, and also to the prominence given in the recital to the common purpose that the quarries should be remunerative and profitable to the partners."

From these observations it is quite clear that this Court should not substitute its own discretion for that of the Court below except for very good reasons.

Mr. Asoke Sen does not suggest that the learned Judge acted capriciously, but he does suggest that the learned Judge could not have taken into consideration certain aspects of the case. Mr. Sen has suggested that the delay is not very great. But surely a suit filed in 1947 should at least be ready for trial by 1950. Again Mr. Sen has contended that his client clearly is a partner and that he is clearly entitled to some relief. The defendants, however, deny that the plaintiff ever was a partner in the rice Mills and it is quite impossible for this Court to say that the plaintiff had such a case that he was bound to succeed at least to some extent. Mr. Sen further contends that in any event the

learned Judge was wrong in dismissing the suit because the plaintiff was prepared there and then to set the case down for hearing. A suggestion to that effect was made to the learned Judge and it is said that in dismissing the suit for default after that suggestion was made he was acting contrary to legal principles. In support of that contention Mr. Asoke Sen relied upon a Bench decision of this Court in *Dawoodayal Kothari v. Shibnath Roy Burman* (1) in which it was held that before the court proceeds under Ch. 10 r. 35 of the Original Side Rules to deprive a litigant of his right to prosecute his claim the court should be satisfied that to do otherwise would be to permit an abuse of the process of the Court. One test of such abuse is to challenge the laggard plaintiff to set down his case at once and proceed to trial without delay according to the rules. Where an offer had been made to set the suit down for immediate trial the Bench held that under the circumstances of the case, the proper course to pursue was to direct the plaintiff to proceed to trial at once without dismissing the suit.

It is quite clear that each case must depend upon its particular facts and in a later case *Provash Chandra Dutta v. Santhal Pargana Electric Supply Corporation Ltd.* (2), a Bench expressed the view that a mere offer to set the case down for immediate trial was by no means the determining factor.

In my view the learned trial Judge could well have come to the conclusion in this case that the delay was such as to amount to an abuse of the process of the Court. Further it was a material factor that the plaintiff offered no explanation whatsoever for the delay. Had some reasonable explanation been offered different consideration might apply. But there is no explanation at all as to how this case was allowed to drag on and why no step was taken for such a long time even after discovery had been obtained and inspection had. It might be that if the matter had come at first instance before this Bench we might, though I do not say that we would, have dealt with this as a border line case and given the appellant as it were the benefit of the doubt. But the matter comes before us in appeal and it seems to me that it is quite impossible to say that the learned Judge did not exercise judicially the discretion which the rule gives him. There was abundant material upon which the learned Judge could rightly hold that the suit was liable to

CIVIL.

1950.

Mahadeo Prosad
Rungta.

v.

Sm. Luxmi Debi.

Harries, C. J.

(1) (1942) 46 C.W.N. 653.

(2) (1944) 48 C.W.N. 640.

Civil. be dismissed for default of prosecution. As I have said had any
 ——— reasonable explanation been given more could have been said for
 1950. the appellant, but what makes the matter worse is that this
 Mahadeo Prosad delay occurred when solicitors were acting for the appellant.
 Rungta. In such circumstances there was gross negligence and gross
 v. neglect on the part of some one and I do not think this is a case
 Sm. Luxmi Debi. in which we could interfere.

Harries, C. J.

In the result therefore, the appeal fails and is dismissed with costs.

S. N. Banerjee, J.:—I agree.

Messrs. Khaitan & Co.: Solicitors for the Appellant.

Mr. B. M. Bagaria: Solicitor for the Respondents.

S.C.

Appeal dismissed.

Before Sir Arthur Trevor Harries, Kt., Chief Justice
and Mr. Justice S. N. Banerjee.

BAIJNATH BAJORIA

v.

SK. MD. MATEEN AND OTHERS.*

Civil.

1950.

August, 14.

Calcutta Thika Tenancy Act of 1949 (West Bengal Act II of 1949), Sec. 2(5)—“Thika Tenant,” definition of—The tenant to prove a “system.”

Unless the tenant shows that he holds under one of those systems as holding a tenancy under such a system as defined in the Act. If there is cannot be described as Thika Tenancy within the meaning of the Act.

Sm. Suraj Jan Bibee v. Banku Behary Saha (1) followed.

The Calcutta Thika Tenancy Act of 1949, only applied to a person holding a tenancy under such a system as defined in the Act. If there is no such system in Calcutta the Act can have no application to tenancies in Calcutta.

Suit for possession of certain property together with mesne profits.

The material facts will appear from the judgment.

Mr. G. K. Mitter for the Appellant.

Messrs. E. R. Meyer and A. K. Banerjee for the Respondents.

The judgments of the Court were as follows:—

Harries, C. J.:—This is an appeal from a judgment and decree of P. B. Mukharji, J. dated December 2, 1949 by which he decreed the plaintiff's claim for possession of certain property together with mesne profits.

August, 14.

The predecessors in title of the plaintiff-respondent granted a lease to the defendant-appellant on November 29, 1943 of a piece of vacant land known as No. 83, Lower Circular Road having an area of 3 bighas and 14 cottahs. The lease was for a

* Appeal from Original Decree No. 51 of 1950 against the decree passed by P. B. Mukharji, J. dated 2nd December, 1949.

(1) (1949) 84 C.L.J. 183.

CIVIL.

1950.

Bajjnath Bajoria

v.

Sk. Md. Mateen.

Harries, C. J.

term of three years from December 1, 1943. The rent payable was Rs. 500/- per mensem.

By the terms of the lease the lessee was entitled to erect structures upon the land and further he was entitled to remove all structures erected by him on the expiry of the period of lease.

On May 4, 1946 the lessors transferred the reversion to respondent No. 1. At the termination of the lease on December 1, 1946, the plaintiff respondent demanded possession, but the defendant appellant refused to vacate. Hence the suit for ejectment and mesne profits.

The only defence put forward was that the defendant was a Thika tenant and his possession therefore was protected by the Calcutta Thika Tenancy Act of 1949 (West Bengal Act II of 1949).

The learned Judge came to the conclusion that the defendant had failed to establish that he was a Thika tenant as defined in that Act and therefore no question of special protection under that Act could arise. In the view of the learned Judge it was an ordinary case of a lessor claiming possession, at the expiry of the period of a lease of vacant land.

Whether the defendant was entitled to the protection given by the Calcutta Thika Tenancy Act of 1949 must depend upon whether the lease created a Thika tenancy as that term is defined in the Act.

The term "thika tenant" is defined in section 2(5) of the Calcutta Thika Tenancy Act, 1949 in these terms:

" 'Thika tenant' means any person who under the system commonly known as 'thika,' 'thika masik utbāndi' 'thika masik,' 'thika bastu' or under any other like system holds, whether under a written lease or otherwise, or has been recorded in any record of rights as holding, under the title 'dakhil basatkar' or other like appellation, land under another person and is, or but for a special contract would be, liable to pay rent, at a monthly or at any other periodical

rate, for that land to such other person and has erected any structure on such land for a residential, manufacturing or business purpose and includes the successors in interest of such persons."

CIVIL

1956.

Bajinath Bajoria

v.

Sk. Md. Mateen.

Harries, C. J.

The defendant called evidence in the court below with a view to showing that he was a Thika tenant. But the learned Judge was not satisfied that he was thika tenant as defined in the Act. All that the defendant could show was that he held under a lease for three years which provided for the payment of rent at a monthly rate and further that he had erected a structure for a manufacturing or business purpose upon the land. That it was said, made the lessee a thika tenant within the meaning of the term as used in the Calcutta Thika Tenancy Act. The learned Judge however pointed out that not only must a person, who claims to be a thika tenant show that he holds under a written lease or otherwise certain property at a rent and that he has erected structures on the property, but he must also show that he holds under the system commonly known as 'thika', 'thika masik', 'thika masik utbāndi', 'thika bastu' or under any other like system. Unless the tenant shows that he holds under one of those systems, his tenancy cannot be described as a thika tenancy within this Act. Merely to show that he held under a written agreement at a monthly rent and that he had erected structures is merely to show part of what is necessary to constitute him a thika tenant. He must further show that he holds the land under one of these systems.

The matter was considered by a Bench of this Court in the case of *Sm. Suraj Jan Bibee v. Banku Behary Saha* (1). After citing earlier cases decided by single Judges, I observed at page 186:

"Both these cases make it clear that the person seeking the protection of the Ordinance must show that his tenancy is under one of these various systems. There is no evidence at all as to whether this tenancy is covered by any of these systems and therefore, I think Banerjee, J. was right in holding that the Ordinance gave no protection to the appellant."

(1) (1949) 84 C.L.J. 183.

CIVIL.

1930.

The Ordinance to which I made reference has now been replaced by the Thika Tenancy Act. This Bench case is clearly binding on us and should be followed.

Baijnath Bajoria

v.

Sk. Md. Mateen.

Harries, C. J.

It appears that in a later case P. B. Mukharji, J. appears to have thought that there was no system such as 'thika', 'thika masik utbandi', 'thika masik' or 'thika bastu' known in Calcutta. Be that as it may, the Act clearly only applies to a person holding a tenancy under such a system. If there is no such system then the Act can have no application to tenancies in Calcutta.

On behalf of the appellant it was urged that as it could not be established that the appellant held under any such system the court should hold that as he complied with the remainder of the definition he was a thika tenant. We cannot accede to such a contention. Unless the defendant appellant comes within the definition of a thika tenant as given in the Act he cannot claim the protection given by that Act. We cannot overlook the fact that the word 'thika' has a variety of meanings. Frequently it is used to cover a lease granted to a farmer of rents. It seems to me that in the Calcutta Thika Tenancy Act a thika tenant is a very special form of tenant and as the appellant has failed to show that he is such a tenant he had no defence to this claim.

That being so, the suit was rightly decreed and the appeal must be dismissed with costs. The appellant must vacate the premises within fourteen days of to-day. The respondent will be entitled to execute the decree of this Court after the expiry of fourteen days.

S. N. Banerjee, J.:—I agree.

Mr. C. C. Biswas: Solicitor for the Appellant.

Messrs. Mitra and Mukherjee: Solicitors for the Respondents.

S.K.R.C.

*Appeal dismissed
with costs.*

APPELLATE CIVIL.

Before Mr. Justice R. P. Mukherjee.

BIPRA CHARAN SARKAR AND OTHERS

v.

SM. RUPESWARI DAS.*

CIVIL.

1950.

July, 24, 25.
September, 6.

Recovery of Possession—Mortgage—Prior mortgagee not making subsequent mortgagee a party to his mortgage suit and purchases the property—Suit for recovery of possession of such property from the subsequent mortgagee who purchased the mortgaged property in execution of his decree, if maintainable—Subsequent mortgagee if bound to redeem him when such suit instituted after period of limitation to enforce the mortgage.

Where prior mortgagee does not make a subsequent mortgagee a party to his mortgage suit and in execution of the mortgage decree obtained in such a suit purchases the property himself, a suit to recover possession of such property from the subsequent mortgagee who has purchased the mortgaged property in execution of his decree is maintainable and the subsequent mortgagee is not bound to redeem him if such suit is instituted after the period of limitation to enforce the mortgage.

Guruprasad Sukul v. Tarni Charan Deb Nath (1) followed.

Dhupabai Mini v. Chandra Nath Chakrabarty (2) and *Jagat Chandra v. Abdul Rashid* (3) approved.

Bijai Saran Sahi v. Rudrabageshwari Prasad (4) referred to.

Niharmala v. Sarojbandhu (5) and *Gangadas Bhattak v. Jogendra Nath Mitra* (6) referred to.

The Plaintiff, subsequent mortgagee, is the Appellant.

Suit for declaration of title and for recovery of possession.

The material facts will appear from the judgment.

* Appeal from Appellate Decree No. 479 of 1946 against the decree of S. C. Chakrabarty, Subordinate Judge, Maldah in Title Appeal No. 64 of 1945 dated 28th August 1945 affirming the decree of B. K. Bhattacharjee, Munsiff, and Court, Maldah, dated the 30th April 1945.

(1) (1938) 42 C.W.N. 1065.

(2) (1938) 42 C.W.N. 721.

(3) (1937) 38 C.W.N. 1178.

(4) (1929) 51 C.L.J. 70 P.C.

(5) (1933) 37 C.W.N. 897.

(6) (1907) 11 C.W.N. 403.

CIVIL.

Mr. Apurbadhone Mukherjee for the Appellants.

1950.

Mr. Jnanendra Nath Bakshi for the Respondent.Bipra Charan
Sarkar.

C.A.V.

Y.
Rupeswari Dasi.

September, 6.

The judgment of the Court was as follows:—

R. P. Mookerjee, J.:—The property in suit originally belonged to three brothers Doman, Satish and Ananta. In 1929 Doman as Karta of the joint family executed mortgage in respect of the lands in dispute as also other lands in favour of the plaintiff. Before the mortgage dues had been cleared it is alleged that Doman in collusion with the landlord had got the properties sold in execution of a decree for the realisation of arrears of rent. The landlords were auction-purchasers. The landlord settled 6 bighas out of 12 bighas to Rupeswari, mother of Satish and Ananta. She is defendant No. 1 in the present suit. The remaining 6 bighas of the said property was settled by the landlord in favour of Damayanti, wife of Doman. In 1940 the plaintiff brought a suit to enforce the mortgage which had been created by Doman in 1929. Satish and Ananta the brothers of Doman as also Damayanti widow of Doman were made defendants. Rupeswari in whose favour the landlord had made a fresh settlement of half the lands were not impleaded. The plaintiff obtained an *ex parte* decree and ultimately the properties mortgaged were sold in execution and purchased by the plaintiff. The plaintiff further stated that they had obtained possession on the 11th December, 1942. Defendants having resisted, the present suit was filed on the 17th June, 1944. The parties impleaded are Satish, Ananta and Damayanti as also Rupeswari. The plaintiff prayed for declaration of their title and for recovery of possession of the lands in suit. The Defendants contend that the plaintiff's allegation that the rent sale was a fraudulent one or that the settlement in favour of Rupeswari was *benami* one are not correct. As Rupeswari had not been impleaded in the mortgage suit the plaintiffs were not entitled to have their title declared in respect of the 6 bigha plot settled with Rupeswari.

The trial court held that the Rent sale by the landlord was not a collusive one and that Rupeswari had taken settlement of the 6 bighas plot now in suit in her own name. The learned

Munsiff further held that the plaintiffs were entitled to ask Rupeswari to redeem the mortgage but the suit as framed for delivery of possession on declaration of title was dismissed.

The lower Appellate Court affirmed the decision of the trial Court both as regards the *bonafides* of the rent sale as also the settlement in favour of Rupeswari. It was also found that though the plaintiffs were entitled to call upon the owner of the equity of redemption who had been left out in the mortgage suit to redeem the mortgage but such a suit could be made only so long as the plaintiff could bring a fresh suit on the mortgage. In this particular case the present suit was brought when a suit to enforce the mortgage was barred. Rupeswari, therefore could not be compelled to redeem the mortgage. The appeal was accordingly dismissed.

On the question whether the purchaser at a mortgage sale can successfully claim for possession against the purchaser of the right of redemption, who had not been made a party in the mortgage suit, and, if he can, on what condition, there has been a great divergence in the views expressed in different cases in this Court as also in other Courts. In the circumstances this Bench as constituted has to decide which current of decisions is to be followed. The weight of authorities as in recent decisions of this Court seems to support the defendants in the present case. Reference may in this connection be made to *Guru Prosad Sukul v. Tarini Charan Debnath* (1) and the earlier decisions referred to therein. It has been held that where prior mortgagee does not make a subsequent mortgagee a party to his mortgage suit and in execution of the mortgage decree obtained in such a suit purchases the property himself a suit to recover possession of such property from the subsequent mortgagee who has purchased the mortgaged property in execution of his decree is maintainable and the subsequent mortgagee is not bound to redeem him if such suit is instituted after the period of limitation to enforce the mortgage. See also *Dhupabai Mini v. Chandra Nath Chakrabarty* (2), *Jagat Chandra v. Abdul Rashid* (3).

Reliance has also been placed in the later decisions on *Bijai Charan Sahi v. Rudrabageshwari Prasad* (4), as supporting the view expressed in *Jagat Charan v. Abdul Rashid* (3).

(1) (1938) 42 C.W.N. 1065.

(2) (1938) 42 C.W.N. 721.

(3) (1937) 38 C.W.N. 1178.

(4) (1939) 51 C.L.J. 70 P.C.

Civil.

1950.

Bipra Charan
Sarkar.

v.

Rupeswari Dasi.

Mookerjee, J.

Civil.

1950.

Bipra Charan
Sarkar,

v.

Rupswari Dasi.

Mookerjee, J.

A somewhat contrary view had been expressed in some of the earlier cases and reference may be made amongst others to *Niharmala v. Sarojbandhu* (1), *Gangadas Bhattak v. Jogendra Nath Mitra* (2), *Harpershad v. Dulmardan* (3).

In this view this appeal is dismissed. In the circumstances of the case there will be no order for costs in this Court.

Leave to appeal under clause 15 of the Letters patent is granted.

Appeal dismissed.

S.C. *Leave under clause 15 of Letters Patent granted.*

- (1) (1933) 37 C.W.N. 897.
- (2) (1907) 11 C.W.N. 403.
- (3) (1905) I.L.R. 32 Cal. 891.

ORIGINAL CIVIL.

Before Mr. Justice D. N. Sinha.

PREMRAJ MUNDRA

v.

MD. MANECK GAZI AND OTHERS.*

Civil

1951

January, 10.

Attachment before judgment—Order 38 Rules 5 and 6 of the Civil Procedure Code (Act V of 1908)—Guiding principles for application of the Rules.

The guiding principles to be applied for attachment before judgment are the following:—

(1) That an order under Order XXXVIII, rules 5 and 6, can only be issued if circumstances exist as are stated therein;

(2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court;

(3) That the Court would not be justified in issuing an order for attachment before judgment, or for security merely because it thinks that no harm would be done thereby, or that the defendant would not be prejudiced;

(4) That the affidavits in support of the contentions of the applicant must not be vague and must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the sources of information should be disclosed, and the grounds for belief should be stated;

(5) That a mere allegation that the defendant was selling his properties is not sufficient. Particulars must be stated;

(6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation;

(7) Where only a small portion of the property belonging to the defendant is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim;

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit had been filed. There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the

* Application under O. 38 rr. 5 and 6 of the Code of Civil Procedure in re: Suit No. 3517 of 1950.

CIVIL.

1951.

Premraj Mundra

v.

Md. Maneck
Gazi.

Court to look to the conduct of the parties immediately before suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of his property and, if so, with what intention: The Court is entitled to consider the nature of the claim and the defence put forward;

(9) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance but not by itself sufficient;

(10) That in the case of running business, the strictest caution is necessary, and the mere fact that a business has been closed or that its turnover has diminished, is not enough;

(11) Where, however, the defendant starts disposing of his properties one by one immediately upon getting a notice of the plaintiff's claim and/or where he had transferred the major portion of his properties, shortly previous to the institution of the suit and was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn, that the object of the defendant was to delay and defeat the plaintiff's claim;

(12) Mere removal of properties outside jurisdiction is not enough, but where the defendant, with notice of the plaintiff's claim suddenly begins removal of his properties outside the jurisdiction of the appropriate court and without any other satisfactory reason, adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened;

(13) The defendant in a suit is under no liability to take any special care in administering his affairs simply because there is a claim pending against him. Mere neglect, or suffering execution by other creditors is not a sufficient reason for an order under order 38.

(14) The sale of properties at a gross undervalue or benami transfers are always good indications of intention to defeat the plaintiff's claim. The court must however be very cautious about the evidence on these points and not rely on vague allegations.

Application by the Plaintiff for an order that the Defendants do furnish security for the Plaintiff's claim and in default some of the properties belonging to the Defendants be attached before judgment.

Suit is one for goods sold and delivered by the Plaintiff to the Defendants.

The material facts will appear from the judgment.

Mr. M. Hazra for the Petitioner.

Mr. Priti Burman for the Respondents.

CIVIL.

The judgment of the Court was as follows:—

1951.

Premraj Mundra

v.

Md. Maneck
Gazi.

January, 10.

D. N. Sinha, J.:—This is an application under the provisions of Order XXXVIII, rules 5 and 6, of the Code of Civil Procedure, for an order that the defendants do furnish security for the plaintiff's claim, and in default, the properties set out in the schedule annexed to the petition, belonging to the defendants, be attached before judgment. There is a further prayer for Receiver, but this is not pressed.

The suit is for goods sold and delivered by the plaintiff to the defendants. The sale is evidenced by a document described as a "chalan" in the petition, the actual document being headed as a "credit memo." A copy of this document has been annexed to the petition. This "credit memo" states the name of the purchaser as Muhammad Maneck Gazi. It then gives the description of the goods, together with its rate and prices. It contains an endorsement at the bottom as follows:—

"We certify the above prices is/are correct and no overcharge has been made." It is signed by the purchaser, namely, Md. Maneck Gazi. The document also contains "the Salesman's signature."

The petitioner states that the defendants made payments from time to time and returned a portion of the goods and there is now due, a sum of Rs. 7,927/10/- from the defendants which they have failed to pay.

It is stated that the defendants are Muhammadan businessmen and they used to carry on a small business at their residence at village Raghbati, Basirhat, in the district of 24 Parganas. The village is just on the border of Hindusthan and Pakistan. It is stated that they have stopped their business at Raghbati and have started a small business in Pakistan. It is further alleged that the defendants approached one Shyamapada Upadhyay, a zemindar and landholder, residing at village Sarapool in Basirhat, very near the village of Raghbati, a few weeks ago, and requested him to purchase the immovable properties belonging to the defendants, particulars whereof are set out in

CIVIL.

7951.

Premraj Mundra

v.

Md. Mañeck

Gazi.

Sinha, J.

the petition, for a sum of Rs. 8,000/-. I have before me an affidavit of Shyamapada Upadhyay, and he not only confirms that the defendants wished to sell off the properties, but he also says that they told him that they wished to sell away their properties and go to Pakistan to settle down there. The petitioner alleges that the defendants are trying to dispose of their properties with the intention of obstructing and delaying the execution of any decree that may be passed against them.

The defendant No. 1 has filed an affidavit in which he has taken a very curious defence to the suit. He says that he lent his godown to the petitioner for storing his goods, and in view of that fact, the petitioner used to get credit vouchers signed by him. He says that he signed the vouchers as witnessing the quantity of articles stored. He concludes by saying that nothing is due from him; on the contrary he is to get commission for storing the articles.

In view of the "credit memo" signed by him as mentioned hereinbefore, this story sounds incredible. It is true that at this stage I cannot come to a final decision as to the merits of the defence; but I am entitled to consider the evidence as has been presented before me, to discover whether the defence is a bona-fide one or whether the defendants have any reasonable chance of success at the trial. Further, as I will presently explain, I have to come to a decision as to the intention of the defendants and as to whether I should believe the case made by them or that of the petitioner and his witnesses.

The learned Advocate appearing on behalf of the defendants stresses the point that I cannot at this stage go into the question of the merits of the suit at all. He further states that no case is made out to show that the defendants were transferring their properties with an intention to delay or defeat the plaintiff's claim. It is therefore necessary for me to recapitulate the law on the subject. The relevant portion of Order XXXVIII, rules 5 and 6 of the Code of Civil Procedure runs as follows:—

- 5 (1) "Where at any stage of a suit, the Court is satisfied by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him,—

(a) is about to dispose of the whole or any part of his property, or

Civil

1951

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

Premraj Mundra
v.
Md. Maneck
Gazi

Sinha, J.

the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security

- 6 (1) Where the defendant fails to show cause why he should not furnish security or fails to furnish the security required, within the time fixed by the Court the court may order that the property specified or such portion thereof as appear sufficient to satisfy any decree which may be passed in the suit be attached."

The necessity for orders under this rule arises almost daily among litigants. As will be found from a plain reading of this rule, the mere disposal or removal by the defendant of any of his property is not sufficient, such disposal or removal must be with intention to obstruct or delay the execution of any decree that may be passed against the defendant. It is not always easy to establish the intention of the debtor, and the cases must necessarily depend on their own facts. No hard and fast rule has ever been found as to what facts would be sufficient to entitle the creditor to get an order under this rule. It has rightly been pointed out that the powers given under this rule are wide, and unless cautiously applied, might become oppressive to the defendant. It has also been pointed out that a wealthy plaintiff might abuse the provisions of this rule into paralysing a poor defendant by freezing all his assets. It has also been stated quite rightly, that just because the plaintiff has filed a suit, the defendant is under no obligation to stop all dealings with his properties. On the other hand, it has to be borne in mind that the

Civil

1951.

Premraj Mundra

v.

Gazi

Md. Maneck

Sinha, J.

creditor is seldom in a position, immediately on the filing of a suit, to establish by conclusive evidence that the defendant was about to dispose of his properties with the intention of delaying or obstructing his claim. The unfortunate creditor who cannot get his claim paid is entitled to as much protection as the debtor. Legal proceedings in this country are still expensive and protracted. The plaintiff often finds that after a long and expensive litigation, he gets a decree which is worse than useless, as in the meantime the defendant has got rid of all his properties.

In my opinion, therefore, although the provisions of this rule are to be applied with caution, if they are applied too strictly, the plaintiff can only obtain an order under conditions which are theoretically possible but which in practice will be impossible to demonstrate to the hilt. I think that the Court should follow the golden means and come to a conclusion on the facts and circumstances of each case as to whether a reasonable man should apprehend that what the defendant was doing was with the intention of defeating the plaintiff's claim. A certain amount of inference from the facts disclosed, is inescapable.

I shall now proceed to deal with the authorities on the point.

In the case of *Shoshee Shekhoreswar Roy v. Haro Gabind Bose* (1), the facts were as follows:—

The defendant acted as a Manager of the plaintiff for some time. As security, he deposited in the Collectorate a sum of Rs. 15,000/-. He then got another appointment under the Court of Wards and was desirous of depositing a part of this very sum as security, and the Collector had no objection. The plaintiff applied for an order under section 483 of the Code which corresponds to Order XXXVIII, r. 5 of the present Code. Garth, C.J., stated as follows:—

“ We consider on the contrary that there was no ground whatever for the application. We quite agree with the Bombay High Court that the power given to the Courts under this Section should be exercised sparingly and with the utmost caution. A Civil Court should be thoroughly satisfied before it proceeds under that Section that the

(1) (1883) 13 C. L. R. 356.

defendant is really disposing of his property with intent to obstruct or delay the execution of any decree that may be passed against him. We find here not the slightest pretence for any such supposition. . . . What possible reason have we for supposing that the defendant is doing this for the purpose of obstructing or delaying the execution of any decree that may be passed against him?

Civil
—
1951
Premraj Mundra
v.
Md. Maneck
Gazi
—
Sinha, J.

If Courts were to use this Section in the manner contended by the plaintiff, they would become the instrument of the grossest oppression."

In *Jai Prakash Narain Singh v. Basants Kumari Debi*, (1) Mookerjee, J. agreed with this decision of Garth C.J. and stated as follows:—

"The Court should be fully satisfied before it proceeds under that section, that the defendant is really disposing of his properties with intent to obstruct or delay the execution of any decree that may be passed against him."

In this case, the plaintiff was the mortgagee and his allegation was that the mortgaged property would not be sufficient and that unless an order for attachment before judgment was granted, the defendants would dispose of the whole of their property. The affidavit in support was of the vaguest character, being verified true to information and belief, the source of information or the grounds for belief not being disclosed. The learned Subordinate Judge stated that there would be no "Harm" in keeping the properties under attachment. Mookerjee, J. pointed out that this view was manifestly wrong and could not be sustained. He proceeded to say as follows:—

"An attachment practically takes away the power of alienation, and such a restriction on the exercise of the undoubted rights of ownership ought not to be imposed upon an individual except upon clear and convincing proof that the order is needed for the protection of the plaintiff."

In the case of *Monmothonnath Sett v. Nagendranath Bhattacharya* (2), the plaintiff wanted to have an attachment before judgment on the ground that three or four years previously, the

(1) (1911) 15 I. C. 604.

(2) (1925) A. I. R. [1926] Calc. 855.

Civil

1951

Premraj Mundra

v.

Md. Maneck

Gazi

Sinha, J.

defendant and his father had borrowed a sum of Rs. 25,000/- and mortgaged their property. Cuming J. stated as follows:—

“It may be here pointed out that the mere fact that the defendant in the past mortgaged his property or otherwise disposed of it would not be in itself a sufficient ground for an order under Order XXXVIII, r. 6. What we are concerned with is the present conduct of the defendant and the Court must be satisfied that he is now about to dispose of his property with the intention of delaying and obstructing any decree that the Court might pass against him.”

In this case also, the relevant paragraphs of the affidavits were verified true according to information, enquiry and belief but the sources or grounds thereof were not disclosed.

In the case of *Sourendra Nath Mitra v. Sm. Tarubala*, (1) the defendant had admittedly vast properties. She had been running into debts, but the amount of debts compared to the amount of her properties, did not amount to very much. Mookerjee J. stated as follows:—

“The nett result of that then is that there are the aforesaid claims on the appellants’ estate, an attachment in respect of Rs. 50,000/- on one of the Calcutta properties, and that the appellants are about to mortgage their property for Rs. 1,50,000/-, which it is said, is due to one of the creditors. These facts taken together, and in view of the value of the appellants’ properties, in my opinion, fall far short of establishing that the defendants are about to dispose of their properties with intent to obstruct or delay the execution of any decree that the plaintiff may obtain. An attempt to secure debts already incurred by executing a mortgage in respect of them, does not necessarily indicate an intention to obstruct or delay the execution of a decree which has not yet been passed, and such a mortgage will not, in a case when the value of the properties far exceeds the amount of the said debts as well as the claim in the suit, necessarily obstruct or delay the execution, for the plaintiff will be able to put up properties to sale, subject to the mortgage that may be executed and realise the decretal dues.”

In the case of *Sikharja Nath Roy Chowdhury v. Raja Janaki Nath Roy*, (2) an order for attachment was made by the

(1) (1927) 31 C. W. N. 432.

(2) (1932) 36 C. W. N. 790.

court below, because the mortgagors were obstructing the mortgage sale, and properties subject to the mortgage were being allowed to get into arrears for Government revenue. It was alleged that there was gross neglect of the judgment debtors themselves which would lead to great obstacle in the way of the decreeholders realising their dues. Rankin, C.J., stated as follows:—

Civil

1951

Premraj Mundra
v.
Md. Maneck
Gazi.
Sinha, J.

"You cannot get an order under Order XXXVIII for gross neglect In the same way he (meaning the lower court) illustrates as a typical instance in support of the applicant's allegation the case of a property sold in execution of a decree by the Khulna Loan Co., as if the fact that the man is suffering an execution sale is the same thing as voluntarily disposing of his property with a fraudulent intention It seems to me almost difficult on the affidavits to pretend that there is any case under Order XXXVIII While one quite sympathises with the laudable desire of the mortgagees trying to realise their dues by attaching other properties of the judgment-debtor, that is certainly not the object of the provisions of Order XXXVIII."

In the case of *Durgadas Das v. Nalin Chandra Nandan*, (1) the plaintiff alleged that the defendants were trying to dispose of their properties set out in his schedule to the plaint. This statement was based partly on information and partly, on belief, but the sources of information as well as the grounds of belief were not stated. No overt act towards the alienation of the properties was even suggested, such for example, negotiations or offers for sale, and there was no proof that the properties were in danger of alienation. Most of the title deeds of the properties were in the possession of the plaintiff. Lort-Williams J. stated as follows:—

"But the Court must be thoroughly satisfied and there is nothing in these documents to show that the defendants ever had any intention of obstructing or delaying the execution of any decree which might be passed against them, or with such intent were about to dispose of their property. Mere vague allegations are not sufficient and the mere fact that a defendant has in the past mortgaged or disposed of his property, is not a sufficient ground

(1) (1934) 38 C. W. N. 771.

•CIVIL.

1951

Premraj Munda

v.

Md. Maneck

Gazi

Sinha, J.

for levying attachment. There must be a present intention. . . . Moreover, the Court must be satisfied that interference is necessary to prevent injury which is irreparable, and that the mischief or inconvenience which is likely to arise in consequence of withholding the relief will be greater than that from granting it Finally, neither injunction nor attachment out to be lightly granted. It would be a serious thing if persons in possession were restrained from making use of the property merely because a suit has been instituted about it. It is only where it is essential that properties should be kept in its existing condition, that the Court should interfere."

In the case of *Nowroji Pudumjee Siradar v. The Deccan Bank Ltd.* (1) the plaintiffs were voluntary liquidators of the Deccan Bank and filed a suit against the defendant to recover losses incurred by the bank owing to the alleged misconduct and negligence of the defendants. McLeod C.J. stated as follows:—

"Before an order of attachment before judgment can be made, the Court must be satisfied upon affidavit or otherwise that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him, is about to dispose of the whole or any part of his property. It is not disputed that Defendant No. 1 had agreed to sell two items of his immoveable properties in the Poona District, but merely because he had attempted to sell some of his immoveable properties while proceedings against him are pending, it does not follow that he is disposing of the property with intent to obstruct or delay the execution of any decree that may be passed in the suit. . . . It may be quite possible that the defendant had an intention to defraud the plaintiff. But there is nothing in the mere agreement to sell this portion of the first defendant's property from which it can be presumed that he actually had that intention. A man is not debarred from dealing with his property because a suit has been filed against him. Otherwise, in every case in which a suit is brought against a man, if during the pendency of the proceedings he sells some of his properties that would be at once a sufficient ground to satisfy the Court that he is disposing of his property with

(1) (1921) A. I. R. [1921] Bom. 69.

intent to defraud the plaintiff. Clearly there must be additional circumstances before the Court can be satisfied that such an intention exists."

The learned Judge held that the evidence of certain sales effected by the first defendant in previous years in order to pay off certain debts which had been incurred previous to the transaction in suit, were not sufficient evidence to warrant an attachment before judgment. The learned Judge further stated that there had been a considerable rise in the value of immoveable property in and around Poona, and it was more reasonable to infer that the first defendant was taking advantage of the same to dispose of two items of his immoveable properties which admittedly formed a small proportion of his whole property.

In the case of *Sennaji Kapurchand v. Pannaji Devichand* (1) it was alleged that the first defendant was about to recover the dues of his shop as soon as possible and to remove the articles therefrom. As regards the second defendant it was alleged that he had closed one of the shops, having disposed of all the articles therein, and the other shop was almost closed as its business had dwindled from about two or three lakhs to a very petty sum. The defendant produced ample evidence before the Court that they were substantial merchants and were not about to dispose of their property with intent to obstruct or delay the execution of any decree that the plaintiff might entertain. The plaintiff produced no evidence in answer to this to prove the allegations which he had made and upon which he had obtained an interim order. It was held that an attachment before judgment should not issue.

In the case of *Chandrika Prashad Singh v. Hiralal and others* (2), an order for attachment was made by the Subordinate Judge upon an affidavit affirmed by the Am-Mukhtear of one of the plaintiffs which was of the vaguest description, without disclosing as to how much was true to knowledge and how much true to information and belief, nor the sources of information, nor the grounds of belief. Dawson Miller C.J. stated as follows:—

"The power given to the Court to attach a defendant's property before judgment is never meant to be exercised lightly or without clear proof of the existence of the mischief

(1) (1921) A.I.R. [1922] Bom. 276.

(2) (1923) A.I.R. [1924] Pat. 312.

Civil

1951

Premraj Mundra

v.

Md. Maneck

Gazi

Sinha, J.

Civil

1951

Premraj Mundra

v.

Md. Maneck

Gazi

Sinha, J.

aimed at in the Rule. To attach a defendant's property before his liability has been established by a decree may have the effect of seriously embarrassing him in the conduct of defence, as the properties could not be alienated even for the purpose of putting him in funds or defending the suit which may eventually prove to have been entirely devoid of merit. Such a power is only given when the Court is satisfied, not only that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court, but also that his object in so doing is to obstruct or delay the execution of any decree that may be passed against him, and so deprive the plaintiff, if successful, of the fruits of victory. In the present case, the learned Subordinate Judge has not stated that he does not believe the defendants when they say that they have no intention of alienating any portion of the property under attachment. All he says is that this explanation is not sufficient. It seems to me that once you accept the view that the defendants have no intention of alienating their property, there is no longer any power in the Court to grant an order for attachment before judgment, . . . but the learned Judge goes on and gives as reason for passing the order in question, that it is not made out by the defendants how the decree can be realised if steps are not taken to keep the defendants' property under attachment, and therefore, that no attempts have been made to show how the defendants would be prejudiced if their property did remain under attachment, when, as they say, there was no intention of parting with it . . . It is perfectly clear that the reasons given by the learned Subordinate Judge for ordering an attachment cannot stand."

In the case of *Ram Khelawan Singh and others v. Singheswar Prasad Singh*, (1) the defendant at one stage stated that he was willing to give an undertaking not to transfer the property before the decision of the suit, but ultimately they did not give this undertaking whereupon the learned Subordinate Judge made an order for attachment before judgment. It was held that the order could not stand because an attachment before judgment could only be made if the conditions laid down under Order XXXVIII, r. 5 had been satisfied.

(1) (1927) A. I. R. [1928] Pat. 172.

In the case of *Bedanand Rai v. Nabakumar Singh*, (1) the plaintiff alleged that the defendant had alienated certain items of the properties before the suit, and further stated that the defendants had stated to one Ram Pershad Singh that they were prepared to alienate through collusive and benami sales the remaining properties. There was no evidence as to what properties the defendants were going to alienate. According to Varma J., an alienation previous to the suit was not enough. The Court had to be satisfied that transfers were going to be made after the suit had been filed. The learned Judge referred to the case of *MacGregor v. Cawnpur Sugar Works Ltd.* (2) where it was held that it was open to the Court to look to the conduct of the parties immediately before the suit, and to examine the surrounding circumstances. This statement of the law was accepted but it was held that there must be transactions subsequent to the filing of the suit or an apprehension of such transaction taking place. In the Calcutta case just mentioned, the defendant had been selling his immoveable properties shortly after notice had been given by the plaintiff of his claim to enforce his contract. The learned Subordinate Judge drew the inference that the defendant was about to dispose of his properties with an intention to obstruct or delay the execution of the decree which might be passed against him. Mookerjee J. stated as follows:—

"The facts as they appeared in the proceedings of the Court below, have not been challenged, and we are not prepared to say that the Subordinate Judge has erroneously estimated their bearing. But it has been suggested by the learned Vakil for the Appellant that in order to bring the case under section 483 of the Code of Civil Procedure, it must be proved that the attempt at alienation was made after the commencement of the action. This contention is, in our opinion, based upon a narrow construction of section 483. It is open to the Court to look to the conduct of the parties immediately before the suit and to examine also the surrounding circumstances and from these to draw an inference as to whether the defendant is about to dispose of his property, and, if so, with what intention."

In the case of *Ram Swarup v. Chiranjilal* (3) defendant had transferred 80 per cent of his properties and also changed the name of the firm. It was held that an attachment before judgment should issue.

(1) (1937) I.L.R. 17 Pat. 89.

(2) (1900) 11 C.L.I. 19.

(3) [1941] A. M. L. J. 30.

Civil

1951

Premraj Mundra

v.

Md. Maneck

Gazi

Sinha, J.

Civil

1951

Premraj Mundra

v.

Md. Maneck

Gazi

Sinha, J.

In the case of *General Coal Supply Co., Ltd., Amritsar v. Karamchand Thapar and Bros.*, (1) it was proved that the defendant company was in insolvent condition and was rapidly disposing of its assets. An order for attachment was made.

From a perusal of all the authorities, I think the following guiding principles can be deduced:—

- (1) That an order under Order XXXVIII, rules 5 and 6 can only be issued if circumstances exist as are stated therein;
- (2) Whether such circumstances exist is a question of fact that must be proved to the satisfaction of the Court;
- (3) That the Court would not be justified in issuing an order for attachment before judgment or for security merely because it thinks that no harm would be done thereby or that the defendant would not be prejudiced;
- (4) That the affidavits in support of the contentions of the applicant must not be vague and must be properly verified. Where it is affirmed true to knowledge or information or belief, it must be stated as to which portion is true to knowledge, the sources information should be disclosed, and the grounds for belief should be stated;
- (5) That a mere allegation that the defendant was selling off his properties is not sufficient. Particulars must be stated;
- (6) There is no rule that transactions before suit cannot be taken into consideration, but the object of attachment before judgment must be to prevent future transfer or alienation;
- (7) Where only a small portion of the property belonging to the defendant is being disposed of, no inference can be drawn in the absence of other circumstances that the alienation is necessarily to defraud or delay the plaintiff's claim;

(1) (1934) A. I. R. [1934] Lah. 594.

(8) That the mere fact of transfer is not enough, since nobody can be prevented from dealing with his properties simply because a suit had been filed: There must be additional circumstances to show that the transfer is with an intention to delay or defeat the plaintiff's claim. It is open to the Court to look to the conduct of the parties immediately before suit and to examine the surrounding circumstances and to draw an inference as to whether the defendant is about to dispose of his property and, if so, with what intention: The Court is entitled to consider the nature of the claim and the defence put forward;

(9) The fact that the defendant is in insolvent circumstances or in acute financial embarrassment is a relevant circumstance but not by itself sufficient;

(10) That in the case of running businesses, the strictest caution is necessary, and the mere fact that a business has been closed or that its turnover has diminished, is not enough;

(11) Where, however, the defendant starts disposing of his properties one by one immediately upon getting a notice of the plaintiff's claim and/or where he had transferred the major portion of his properties, shortly prior to the institute of the suit and was in an embarrassed financial condition, these were grounds from which an inference could be legitimately drawn, that the object of the defendant was to delay and defeat that plaintiff's claim;

(12) Mere removal of properties outside jurisdiction is not enough, but where the defendant, with notice of the plaintiff's claim suddenly begins removal of his properties outside the jurisdiction of the appropriate court and without any other satisfactory reason, an adverse inference may be drawn against the defendant. Where the removal is to a foreign country, the inference is greatly strengthened;

(13) The defendant in a suit is under no liability to take any special care in administering his affairs simply

Civil

1951

Premraj Mundra
v.Md. Maneck
Gazi

Sinha, J.

Civil

1951

Premraj Mundra

v.

Md. Maneck
Gazi

Sinha, J.

because there is a claim pending against him. Mere neglect, or suffering execution by other creditors is not a sufficient reason for an order under order 38.

- (14) The sale of the properties at a gross undervalue or *benami* transfers are always good indications of an intention to defeat the plaintiff's claim. The court must however be very cautious about the evidence on these points and not rely on vague allegations.

Applying these principles to the facts of this case, what do I find? The defendants are businessmen in a small way at Raghbhati, a village on the borders of Hindusthan and Pakistan. They have closed the business in India. They have started a business in Pakistan. They approached a prospective purchaser for sale of their entire property. On this point, I have the affidavit of the actual person to whom the proposal was made. As against this, the first defendant makes a mere denial. I have to make up my mind whether to believe the evidence placed before me on behalf of the petitioner or that of the defendant No. 1. I have already stated that the defence taken by the defendants sounds to me incredible. It may be that at the trial evidence would be placed before me which will convince me that the defence is true; but on the face of the admitted document, dated May 6, 1949, I cannot at this stage believe the story put forward by defendant No. 1, and in any event, I am inclined to accept the evidence of Shyamapada Upadhyay rather than that of defendant No. 1. It has been stated in the petition that save and except the properties mentioned in the schedule, the defendants have no other properties in India and this is not denied. Defendant No. 1 says that they have no intention of selling the properties or going away to Pakistan. But regard being had to the defence disclosed and also the fact that the border line between India and Pakistan is so tantalizingly near, I am not at all sure that the apprehensions of the plaintiff are not well-founded. The evidence placed before me on behalf of the petitioner is not vague as was in some of the authorities cited above. The best possible evidence has been placed before me, and I see no reason to disbelieve it. The plaintiff has a bona-fide claim, supported by written documents. Shortly before the

institution of the suit, the defendants have been trying to dispose of the entirety of their immoveable properties at a price which according to their own case, is highly inadequate. They have stopped their business and have started doing business in a foreign country and have expressed their wish to migrate them.

Under the circumstances, I am of the opinion that the plaintiffs have made out a case for the orders asked for, and there will be an order that the defendants do furnish security to the amount of the plaintiff's claim within a fortnight from the date of this order and that in default, the right, title and interest of the defendants in the properties mentioned in Schedule B to the petition, be attached before judgment. The ad-interim injunction will continue until the attachment is made effective. The costs of this application will be costs in the case.

Civil
—
1951
Premraj Mundra
v.
Md. Maneck
Gazi
—
Sinha, J.
—

Messrs. K. K. Dutt & Co.: Solicitors for the Petitioner.

S.K.R.C.

Application granted.

ORIGINAL CRIMINAL.

Before Mr. Justice P. B. Mukharji.

THE STATE

v.

NARENDRA NATH MAJUMDAR.*

Criminal

1951

January, 12

Indian Arms Act (Act XI of 1878) Sec. 19(f) read with Sec. 19(A).—Various theories and cases on the concept of "possession" discussed—Extent of privileged communication between husband and wife under Sec. 122 of the Indian Evidence Act (Act I of 1872)—Concept of possession under Sec. 27 of the Indian Penal Code (Act XLV of 1860)—If applicable to explain "possession" under the Indian Arms Act—Possession as a test or an element of crime—"Control" under Sec. 19(f) of the Indian Arms Act, meaning of—Wife's possession of a pistol without licence, if can mean husband's possession under the Indian Arms Act.

The accused was charged under section 19(f) read with Sec. 19A of the Indian Arms Act for having in his possession or in his control without licence one pistol and four rounds of cartridges. The accused, while in police custody took the police to his bed room and himself looked into the different parts of the bed room in search of pistol but he failed to find any pistol there.

Then the accused talked to his wife and the wife left the room and returned with the pistol and cartridges. The wife was also put under arrest but was later on let off.

Held—(i) The protective provisions under Sec. 122 of the Indian Evidence Act is passed on the wholesome principle of preserving domestic peace and conjugal confidence between the spouse during coverture. The exceptions are also based on common sense.

(ii) Sec. 27 of the Indian Penal Code in terms cannot be applied to explain possession under the Indian Arms Act.

(iii) "Possession" as a test or an element of crime must be of such character as can relate to the fundamental principle of *mens-rea* in Criminal jurisprudence. The *animus* must be there and the *mens rea* must be there.

(iv) There can be no possession without intention or consciousness of will. Wherever possession is a basis of crime consciousness or animus must be established, unless the statute creating the crime excludes it.

* Fifth Criminal Sessions, 1950.

(v) The word "control" under Sec. 19(f) of the Indian Arms Act means that the accused must have such power over the weapon that he can direct its custody, production, use or disposal in some manner. Request and compliance with the request do not necessarily indicate control.

Criminal
1951

The State
v.

Narendra Nath

(vi) Where the place in which an article is found is one to which several persons have equal right of access, it cannot be said to be in possession of any one of them.

The accused in the case was Narendra Nath Majumdar.

Charge under Sec. 19(f) read with Sec. 19A of the Indian Arms Act also charge under Sec. 19(f) alone of the said Act.

The material facts will appear from the judgment.

Mr. J. N. Banerjee for the State.

Messrs. N. Das Gupta and S. N. Roy Chowdhury for the Accused.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—The accused Narendra Nath Mazumdar was charged by the Presidency Magistrate of Calcutta on the 25th November, 1950 under section 19(f) read with section 19-A of the Indian Arms Act for having on the 13th June 1950 in his possession or under his control without the necessary licence one Colt Automatic .32 bore Pistol and also charged under section 19(f) of the Indian Arms Act for having on the same day in his possession or under his control without the necessary licence 4 round of cartridges of .32 bore. On these charges the accused was committed by the Magistrate for trial in the High Court Criminal Sessions.

January, 12.

The total evidence on the point of possession or control on which the accused has been committed for trial is this. The accused was arrested on the 13th June 1950 and was already in custody at Lalbazar. Pursuant to some statement made by the accused the Police expected to recover a Pistol from his house. The accused took S.I., D. P. Roy and Samar Ghosh from Lalbazar Police Station to his house at 42B, Ram Dulal Sarkar Street. The accused took the Police to his bedroom and himself looked into different parts of that bedroom searching to find

out something. But that something was not found. He failed to find the Pistol in the bedroom. The accused's wife Usharani was in the room. The accused talked to his wife and the wife left the room. She told the Police not to follow her when she was going out. She returned after 3 or 4 minutes with the Pistol and the cartridges. She was also put under arrest but was later on let off. That is all the evidence.

There is no evidence as to what the accused told his wife. The wife cannot be called as a witness and compelled to disclose what communication was made by the husband to her. Section 122 of the Evidence Act prevents such disclosure. Communication between the husband and the wife during coverture is privileged and its disclosure cannot be enforced. Indeed the law provided that he or she shall not be permitted to disclose any such communication unless the person who made it or his or her representative in interest consents, except in suit between married persons or proceedings in which one married person is prosecuted for any crime committed against the other. The present case before me does not come within any of these exceptions, and is not a "proceeding in which one married person is prosecuted for crime committed against the other." Here is no crime committed by the husband against the wife. That portion of the language in section 122 of the Evidence Act obviously refers to such crimes as assault or bodily injuries, wrongful confinement etc. by one of the spouse against the other. There may be also other forms of crime but the gist of this exception is that it must be the crime committed by one married person against the other. The question whether the Pistol was in the possession of the husband or the wife cannot in my view be said to involve any crime committed by one against the other. The protective provision under section 122 of the Indian Evidence Act is based on the wholesome principle of preserving domestic peace and conjugal confidence between the spouse during coverture. The exceptions also are based on common sense. Such protection obviously cannot exist in suits between married persons when one of the spouse is litigating against the other or when one of the spouse commits any crime against the other, for to prevent disclosure in that event will be to defeat justice.

There is also no evidence as to where the wife went to bring the Pistol. There is not a scintilla of evidence about the place from where the Pistol was found and brought and whether such

Criminal

1951

The State

v.

Narendra Nath
Majumdar

Mukharji, J.

a place was in the exclusive possession or use by the accused or his wife or whether it was accessible to other people. The importance of this fact will be realised when I discuss later the the law of possession in relation to crimes.

Learned counsel for the State has drawn my attention to section 27 of the Indian Penal Code and has argued that under legal advice the wife was let off because in this case the Pistol although in the possession of the accused's wife the law under that section is said to provide that such possession should be treated as that of the accused husband. This argument in my judgment suffers from a fallacy. Section 27 of the Indian Penal Code provides that when property is in the possession of a person's wife, clerk or servant on account of that person it is in that person's possession within the meaning of that Code. That is a special definition of the Indian Penal Code. The offence with which I am concerned here is not an offence under the Indian Penal Code but an offence under a special Statute, the Indian Arms Act. In my judgment section 27 of the Indian Penal Code in terms cannot be applied to explain possession under the Indian Arms Act.

The concept of possession under the Indian Penal Code which is fully discussed in the Calcutta Full Bench decision of *Emperor v. Fatehchand Agarwalla* (1) is in my opinion not necessarily the same as the concept of possession under the Indian Arms Act. The offence under the Indian Arms Act is possession or control of any arms without licence. To my mind such a concept of possession under the Indian Arms Act must connote an element of consciousness in the person charged with such offence. A person who is not aware of the possession of a weapon without licence cannot in my view be said to commit an offence under the Indian Arms Act. This is not a question of ignorance of law which of course is never a defence or an excuse. In other words if a person is found to be in possession of the arms and such arms are without licence then the offence is complete no matter whether he is ignorant of the law or not and no further question of *mens rea* arises. But that is not the same thing as when the person does not know whether he has in his possession any arms without licence. Ignorance of the fact of possession is a defence to the accused charged with such an offence under the Indian Arms Act. For instance the owner of a house goes out to his office during the

CRIMINAL.

1951

The State

v.

Narendra Nath
Majumdar

Mukharji, J.

(1) (1916) I. L. R. 44 Cal. 477.

CRIMINAL.

1951

The State

v.

Narendra Nath

Majumdar

Mukharji, J.

day and in the meantime some one conceals a Pistol in his house and during his absence from his house the Police arrives and discovers the Pistol. In such a case unless the knowledge of the owner is established by evidence the owner cannot be said to have committed the offence of possession of the Pistol without licence under the Indian Arms Act.

Possession is a difficult concept in law although it is a simple enough word. Salmond in his work on Jurisprudence truly observes "In the whole range of legal theory there is no conception more difficult than that of possession." It is one of the curiosities in jurisprudence. A large number of cases has been shown to me, not all of which seem to be in agreement on the question of principle. Going through the maze of discordant decisions one is left with the impression that the theory of possession in Criminal Jurisprudence is a sadly neglected and a much misunderstood theme.

The decision in *Emperor v. Sikdar* (1) of a single Judge of the Allahabad High Court where it was held that all the adult male members of a Hindu joint family could be proved to be in possession of an unlicensed gun found in their house and it was open to the Police to prosecute one or all of them for the offence appears to be against all canons of criminal jurisprudence. A Bench of two Judges of the same High Court in *Emperor v. Kaul Ahir* (2) Pullen and Tom JJ. dissented from this view and observed "This is a view we are not prepared to accept. We believe that in all such cases it is necessary to prove not only the presence of the article in the house, but the possession of a particular person of that article in order to justify a conviction. In a case such as the present it cannot be said that the head of the house or any individual male member of the family was aware of the cartridges. For all that we know they might have been dropped by some sportsman, picked up by a child and handed over to the child's mother." Then again in the case of *Abdul Rahman v. Emperor* (3) it has been said by Braund J. that possession or control under the Indian Arms Act to constitute an offence must be actual physical possession or control but not constructive possession or constructive control. The other cases referred to are *Surian Singh v. King Emperor* (4) and *Gian Chand v. King Emperor* (5). The case of *Gian Chand* has a comparable context with the present problem before me. In that case it was

(1) (1931) I.L.R. 54 All. 411.

(4) (1946) 48 Cr. L. J. 390.

(2) (1932) I.L.R. 55 All. 112.

(5) (1933) 146 I. C. 232.

(3) (1940) 42 Cr. L. J. 59.

held by Tek Chand J. that although it was the accused who led the Police to the shed and pointed out the place where the revolver was lying, yet the mere knowledge of the fact that revolver was lying in the shed or the pointing out of the place from which it was actually found, without proof that the actual place was in the exclusive possession of the accused is not sufficient to bring home the offence to the accused and that he was not guilty under section 19(f) of the Indian Arms Act. Here in this case before me the facts are worse. The Pistol was not found in the bedroom and no one knows from where it was brought.

Criminal

1951

The State

v.

Narendra Nath
Majumdar

Mukharji, J.

On behalf of the State reliance has been placed on the case of *Lalu Singh v. King Emperor* (1) and on the case of *Hriday Ram v. King Emperor* (2).

In *Lalu Singh's case* (1) unlicensed arms were recovered from a room in the joint possession of two brothers and none of them being willing to take the responsibility it was said that the only possible presumption that the Court can make is that they were in joint control of the arms. On the facts of that case where it was found that the two brothers were in joint exclusive possession of the place where the arms were found. The conclusion that was arrived at in that case was perhaps not wrong. But I am afraid I cannot subscribe to the steps in the reasoning that are to be found in that decision. The learned Chief Judge Thomas sitting singly in that case observes at p. 253 "The word *control* should be taken to mean something more than *actual* possession." With great deference to the learned Chief Judge I should have thought that control could also be something less than or something quite different from actual possession. One may control a weapon without being in *actual* possession of it. Again one may not be able to control a weapon although he is in 'actual' possession of it. At p. 256 of that Report the learned Chief Judge is said to have expressed his views in this way. "I am therefore of opinion that the words "and control" must be taken in a wider sense and to mean something more than actual possession". The language of sec. 19(f) of the Indian Arms Act does not use the words "*and control*" but the words are "or control". If it were "and" then there perhaps might have been

(1) (1942) I.L.R. 18 Luck. 253.

(2) (1945) A.I.R. [1946] All. 4.

CRIMINAL.

1951.

The State
v.Narendra Nath
Majumdar.Mukharji, J.
—

some justification for saying as the learned Chief Judge said that control was something more than actual possession. But that is not the language of the section. In the other case relied on by the State, *Hriday Ram v. King Emperor* (1) Sinha J. holds that the word possession means exclusive possession and the word control means effective control. That was a case of a joint Hindu family where unlicensed arms were found at a place belonging to the family but not in use or occupation of any particular individual of the family and the ratio of the decision is that in such a context the possession or control must be "deemed" to be with the Manager or Karta of the family. The head or the manager of a family may be quite innocent and ignorant of what the bright young things in his family are doing in the matter of illicit and secret arms and yet he is on the basis of this decision a criminal under the Indian Arms Act. I am quite unable to make one a criminal by the dangerous process of "deeming" unless I am forced by the language of the Statute. To make honest citizens criminals by dubious and devious inferences will be to create the most unenviable state of social order. Although such a view was held by a single Judge of the Allahabad High Court it was later overruled by a Bench of the same High Court and to which reference has already been made. I respectfully agree with that Allahabad decision of the Bench of the Judges in *Emperor v. Kaul Ahir* (2) as representing the correct view. I have little hesitation in holding that it is wrong law to say that the mere fact that the accused is the head or Manager or Karta of a family is sufficient for a finding that he must have been in possession or control of the arms found in the joint family house. Apart from the Allahabad decision of two Judges which I have just referred to, I find the decisions in *Sughar Singh v. Rex*, (3) and *Abdul Rahim v. Crown* (4) to be in support of the view I am taking.

The felicitous fiction of the Common Law that husband and wife are one and the same person however, romantic, cannot be extended to say that the wife's crimes are the husband's crimes. That fiction depends on its usefulness to protect such hazards of conjugal life as a necessitous wife or a world that deals with a spouse without being privy to marital infelicities. This rubric of the Common Law even in the conventional sphere is apt to be declassé in the present climate of modern life when the insti-

(2) (1932) I L.R. 55 All. 112.

(3) (1949) 4 Dom. L.R. (All.) 254.

(1) (1945) A.I.R. [1946] All. 4.

(4) I.L.R. [1949] Nag. 519.

tution of marriage does not connote the same orthodox control of the husband over the wife. Whatever it may be, here at any rate it cannot be said by invocation of that fiction that the wife's possession is the husband's possession unless such possession also satisfies the test of criminal jurisprudence relating to the theory of possession, as I have stated.

The language of the Indian Arms Act is possession or control. To my mind it seems that to introduce notions like "actual possession" or "physical possession" or "constructive possession" or "direct possession" or "indirect possession" does not help in getting a clearer idea of the nature of possession which can be said to be an offence or a crime under the Indian Arms Act. I do not find it to be a very helpful process of construction. Possession in law may be all of these or any one of them and yet it may not constitute sometime. For instance there may be planting of the article in the pocket of the person charged in which case although he has the actual or physical possession he does not commit the crime. Similarly again he may not possess the offending article directly but may have it indirectly through his agent but with the knowledge in which event he commits the crime. Possession is not necessarily manual detention.

In my judgment possession as a test or an element of a crime must be of such character as can relate to the fundamental principle of *mens rea* in criminal jurisprudence. The *animus* must be there and the *mens rea* must be there. Unless these notions are specially excluded by any Statute under consideration they are basic test which must be satisfied before a person can be said to have committed a crime whose basis is possession. It is this element of intention or consciousness or knowledge which in my view must be established and must be present as a fact before possession under the Indian Arms Act can be said to constitute an offence. It does not matter in my opinion whether such possession is actual or constructive or physical or mediate or immediate or direct or indirect or exclusive or joint or concurrent. Corpus without the animus is ineffective. No mere physical relation of a person to the thing can have any significance in criminal jurisprudence unless it is the outward form in which the needful animus or intent has fulfilled and realised itself. The animus may be *animus possidendi* being the intent necessary to constitute possession by excluding others from interference,

CRIMINAL.

1951.

The State

v.

Narendra Nath
Majumdar.

Mukharji, J.

CRIMINAL.

1951.

The State

v.

Narendra Nath
Majumdar.

Mukharji, J.

or it may even be *animus sibi habendi* which is not necessarily a claim of right and may be consciously wrongful as the possession of a thief.

The animus is the very basis of any legal concept of possession. Much legal erudition has enriched different schools of world's juristic thought on the problem of intent in possession. Why is possession given legal protection when the possessor is not also the owner. English Law in a fit of good sense supplied by the Common Law allowed title to be set up in defence to a possessory action. English law of possession was developed by means of various remedies for wrongs to possessory rights. Every law is the reflection of the civilisation that produces it. The pragmatic civilisation of England insisted that law like the tree must be known by the fruit it yields. So English law of possession discovered trespass as wrong to possessor's land or goods, conversion as wrong affecting possessory rights in goods only with a variant in Trover a specialised action on the case which was its appropriate remedy, theft or larceny a particular kind of trespass to goods which by reason of trespasser's intent becomes criminally punishable, ejectment and doctrine of seisin in respect of remedies regarding land. The imperial civilisation of Rome made Roman law lay emphasis on corpus and animus in the theory of possession with the major accent on dominion and exclusion, the inevitable stamp of a social order based on slavery. The embers of "dominus" in Roman law were re-kindled by the German civilisation and were fanned into a flame in the Germanic Law of possession with its basic note of will to power. The best known theories have been framed as theories of the German interpretation of Roman Law under the influence of some form of Kentian or post-Kentian philosophy. The type of Roman possession according to German opinion was that of a owner or of one on his way to become owner. Following this out it was said by Savigny the only writer on the subject with whom English readers are generally acquainted that the *animus domini* or intent to deal with the thing as owner is in general necessary to turn a mere physical detention into juridical possession. But such a view leads to the absurd result of excluding bailees from the category of possessors. The effect of this exclusion as interpreted by the Kentian philosophy of law has been to lead the German lawyers to consider the intent

necessary to possession as primarily self-regarding. This philosophy of law proposes that a man's physical power over a subject is protected because he has the will to make it his and that is why it is self-regarding. The will of the possessor being thus conceived as self-regarding, the intent with which he must hold is obviously one for his own benefit. But whatever jurisprudence or juristic school of thought is analysed this at any rate is in my opinion clear that there can be no possession without intention or consciousness or will. In my judgment therefore wherever possession is a basis of crime this consciousness or animus must be established, unless the Statute creating the crime excludes it.

CRIMINAL.

1951.

The State

v.

Narendra Nath
Majumdar.

Mukharji, J.

The next question is whether there is any case to go to the jury.

Very often it is a difficult problem to determine how much is fact and how much is law and it is specially so when the problem is one based on notions of possession. Sir Fredrick Pollock in his "Essay on Possession in the Common Law" published in 1888 by Oxford Clarendon Press at p. 10 makes the following observations which still remain the clearest exposition on the subject and which I consider extremely appropriate in this context. "Every legal relation is or may be an affair both of facts and of right; there are not two separate and incommunicable spheres, the one of fact and the other of right. Facts have no importance for the lawyer unless and until they appear to be, directly or indirectly, the conditions of legal results, of rights which can be claimed and of duties which can be enforced. Rights cannot be established or enforced unless and until the existence of the requisite facts is recognized. Again, the recognition of these facts is not always a direct or simple matter. To some extent their existence must be inferred rather than observed, and this independently of all grounds of dispute in relation to the credibility or accuracy of human testimony. The lines and limits of permissible inference have to be considered, and in time become subjects of authoritative definition. Apply these general notions to the matter in hand, and it will be seen that, even after we have fixed the meaning of the term possession, we cannot completely separate though we may and must distinguish, the elements of fact and of law in a given case. Whether legal possession shall follow physical possession or not is a point of

CRIMINAL.

1951.

The State

v.

Narendra Nath
Majumdar.

Mukharji, J.

law. Whether there exists, at the date in question, between a given person and a given thing, the relation of physical possession or occupation, is wholly or mainly a matter of fact. But this in its turn may be disputed, and then it must be settled whether the specific facts admitted or proved will suffice to establish the existence of the de facto relation of control or apparent dominion required as the foundation of the alleged right; and here we get the kind of questions said expressively if not with dialectic exactness to be of mixed law and fact."

It has been argued that it is for the jury to find as a fact whether in the context that I have described the inference of the guilt of the accused can be reasonably drawn. The principle that I consider should be followed is that where there are no grounds in the evidence taken as a whole upon which any tribunal could properly as a matter of legitimate inference arrive at a conclusion that the accused was guilty and any conclusion on the available materials would be mere conjecture or guess, which are not in law or justice permissible grounds on which to base a verdict then in my view the jury should not be allowed to gamble and speculate on possible inferences. Where there is no scintilla of evidence the Judge in my view is not justified in leaving the case to the jury. There must be some evidence on which the jury can be expected reasonably and properly to conclude a fact to be established before the case can go to the jury. It is for the jury to see whether and how far the evidence is to be believed. And if the facts regarding which evidence is given are such that from them a further inference of fact may reasonably be drawn then also it is for the jury to say whether that inference should be drawn or not. But it is in my view, for the Judge first to determine whether from any facts the inference can legitimately and lawfully be drawn. Such is the observation of Lord Blackburn in *Metropolitan Railway Company v. John Jackson* (1) followed by Jenkins C.J. in the Calcutta Full Bench decision in *King Emperor v. Upendra Nath Das* (2).

On the materials before me I hold that there is no evidence or fact from which any legitimate inference of possession is at all possible to be drawn and the case cannot therefore go to the jury on the question of possession.

(1) (1877) 3 A.C. 193 (207).

(2) (1914) 19 C.W.N. 653 (663).

The learned counsel for the State has also relied on the word "control" in section 19(f) of the Indian Arms Act. It has been argued before me on behalf of the State that even if the accused husband cannot on those facts be said to be in possession of the Pistol so as to constitute the offence, he can at least on the same facts be said to be in "control" of the Pistol. On the same facts the counsel for the State argues that husband's control over the Pistol is established. A little analysis will show that it is not so. The evidence is that the accused looked for the Pistol in his bedroom but failed to find it. At that point of time he cannot be said to have control over a Pistol which he could not find. Then comes a talk with the wife whose words are not in evidence. As already seen the wife cannot be compelled under the law to disclose the nature of the communication she received from the accused husband. It is also not in evidence from the other persons or search witnesses who were present in the bedroom that they overheard the nature of the communication. No one has said what the husband told the wife. For all one knows he might have said "I had seen a Pistol in this bedroom but I cannot find it now. Do you know where it is?" Is that control by the accused husband? I do not think so. Then again he might have said to the wife "Bring the Pistol" which will be quite inconsistent with the accused searching for the Pistol in the bedroom. Or again he might have said to his wife "You are a member of an illegal association and kept one of your Pistols here which I told the Police. Where is it?" There may be other possibilities and conversations of other nature. The mere fact that the wife produced after 4 or 5 minutes the Pistol cannot lead to one particular conclusion to the exclusion of all others beyond all reasonable doubt. In such a context it is quite impossible for the jury to find as a fact whether the husband controlled the Pistol or not. And in this context to ask the jury to find that as a fact or not will be to invite them to indulge in speculation without any scintilla of evidence, a course I am not prepared to follow.

Control in this section under the Indian Arms Act means that the accused must have such power over the weapon that he can direct its custody, production, use or disposal in some manner. Request and compliance with the request do not necessarily indicate control. Control must in this context mean power or ability to regulate the keeping or possession or use or disposal

CRIMINAL.

1951.

The State

-v-

Narendra Nath
Majumdar.

Mukharji, J.

CRIMINAL.

1951.

The State

v.

Narendra Nath
Majumdar.

Mukharji, J.

of the weapon. Is there any evidence in this case to suggest that wife could not have refused to produce the weapon even if she was asked by the husband? I do not find any. I find no evidence on which the accused was committed to trial from which only one possible legitimate inference that the husband controlled the weapon could be drawn, and I therefore hold that the case cannot go to the jury even on the question of control.

The question of control under the Indian Arms Act specially where the weapon is found from a particular place has always to be very carefully examined. One principle is well established. That is, where the place in which an article is found is one to which several persons have equal right of access it cannot be said to be in the possession of any one of them. This principle was laid down first in *Jogibon Ghosh v. King Emperor* (1) as being grounded on common sense and followed and approved by the Division Bench in *Sudhanya Bawali v. King Emperor* (2). As I have said before the evidence here is that the wife went out of the room. But there is no evidence where she went to or whether she went to any other part of the house or went out of the house altogether. In fact there is no iota of evidence as to the place from where the weapon was produced or brought.

In the circumstances I am of the view that the charges are clearly unsustainable within the meaning of section 273 of the Criminal Procedure Code. As Rankin C.J. points out in the Full Bench decision of the Calcutta High Court in *Emperor v. Girish Chandra Kundu* (3). "The reference to portions of a charge and to the charge or portion thereof, being clearly unsustainable, is sufficient to show that the section is intended to provide a short and effective way by which charges, which have no merits, may be disposed of." On the evidence on which the accused was committed to trial before me I find the charges cannot clearly be sustained. I therefore direct that an entry be made to that effect on the two charges.

S.K.R.C.

Charges unsustainable.

(1) (1909) 13 C.W.N. 861.

(2) 1916) 21 C.W.N. 839 (840).

(3) (1929) I.L.R. 57 Calc. 1042 (1957-8).

ORIGINAL CIVIL.

Before Mr. Justice S. N. Banerjee.

In re: An Arbitration

BHUWALKA BROTHERS LTD.

v.

FATEHCHAND MURLIDHAR.*

CIVIL.

1950.

March, 20.

Indian Arbitration Act (Act X of 1940), Secs. 5 and 34—Corresponding Sec. of the English Arbitration Act compared and cases discussed—Discretion of the Court under Sec. 5 of the Indian Arbitration Act, when and how to be exercised—Two limits within which the discretion is to be exercised—West Bengal Jute Goods Future Ordinance, 1949 (Ordinance No. V of 1949)—Old and new theories and cases on frustration of contract discussed—"Actual delivery of possession" in Sec. 2(1) (b) of the Jute Ordinance, meaning of—Effect of the appointment of Bengal Chamber of Commerce as Arbitrator—Difference between the application under Sec. 5 and Sec. 34 of the Indian Arbitration Act—Law regarding disqualification of the Arbitrator—Application of Sec. 14(1) of the English Arbitration Act for the purpose of substantial justice—An Arbitrator would not act as such, if circumstances exist which tend to produce a bias in his mind.

In granting leave under Sec. 5 of the Arbitration Act the Court exercises its discretion. There are two limits within which discretion is to be exercised; One the Court should not lightly release the parties from their bargain that follows from the sanctity the Court attaches to contracts; the other, that the Court should be satisfied that substantial miscarriage of justice will take place in the event of its refusal to grant the leave.

The "appointed Arbitrator" is the Bengal Chamber of Commerce, though under the Rules the Bengal Chamber of Commerce is authorised to delegate its power to a smaller body.

There is no doubt that the meaning of expression "actual delivery of possession" in Sec. 2(1) (b) of the West Bengal Jute Goods Future Ordinance, 1949, has got to be ascertained in the arbitration proceeding.

The difference between the application under Sec. 5 of the Arbitration Act and one under Sec. 34 of the Act is a difference in the point of time when the application is made. If proceedings are commenced in Court application is made under Sec. 34 and if proceedings have not commenced in Court the application is made under Sec. 5. The object of both the Secs. is the same i.e. to prevent the arbitration.

* Application for leave, for the Court to revoke the authority of an Arbitrator.

CIVIL.
 —
 1950.
 —
 Bhuwalka
 Bros. Ltd.
 v.
 Fatehchand
 Murlidhar.

In England under Sec. 14(1) of the English Arbitration Act of 1934, the Court, at present will not refuse an application to revoke a submission or to stay an arbitration on the ground that a party knew or ought to have known that the arbitrator by reasons of his relation towards any party to the agreement or has connection with subject matter referred might not be capable of impartiality. There is no such Sec. in the Indian Arbitration Act of 1940, but the Court can adopt the principles underlying the English Section for the purpose of substantial justice.

It is most fundamental principle of justice that a Judge or a Tribunal would not decide a dispute, if there is a probability that he would be biased in the case.

The ground that an Arbitrator may commit mistake in law is not by itself sufficient to induce the Court to revoke the authority of an Arbitrator for the parties agreeing to refer once took the Arbitrator for better or worse. The Court must be satisfied that unless leave is granted substantial miscarriage of justice will take place.

Application for leave for the Court to revoke the authority of an arbitrator.

The material facts will appear from the judgment.

Messrs. H. N. Sanyal and G. P. Kar for the Petitioners.

Mr. R. C. Deb for the Respondents.

The judgment of the Court was as follows:—

March, 20.

S. N. Banerjee, J.:—This is an application for leave for the Court to *revoke the authority of an arbitrator*. The petitioner also challenged the existence of the arbitration agreement and prayed for Court's decision on the question. This prayer, however, has been abandoned by Counsel.

In this application the only point I have to consider is whether I should grant the leave.

The Court has power to grant leave if it thinks fit. Section 5 of the Arbitration Act is as follows:

“The authority of an appointed arbitrator . . . shall not be revocable except with the leave of the Court, unless a contrary intention is expressed in the arbitration agreement.”

This section corresponds to section 5 of the Indian Arbitration Act, 1899, and section 1 of the English Arbitration Act of 1889. Section 5 reads:

"A submission, unless a different intention is expressed therein, shall be irrevocable except, by leave of the Court".

The English section was also in the same words in substance.

Referring to the English section Bowen, L. J. said, in *Re. Smith & Service and Nelson & Sons* (1) "The language of section 1, 'a submission shall be irrevocable' is ambiguous; it is applicable, not to the agreement to refer but to the authority of the arbitrator."

In *Doleman v. Ossett Corporation*, (2) Fletcher-Moulton, L. J. said, "By common law a submission to a particular arbitrator was revocable at the will of either party, unless it had been made a rule of Court, in which case the leave of the Court must be previously obtained. But this was of the nature of a rescission. Such a revocation involved the breach of no contract, and gave rise to no right of damages. It was merely an exercise of a legal power to revoke which was implied in a submission. On the other hand [as was pointed out by Bowen, L. J., in *Re. Smith & Service and Nelson & Sons* (1)], an arbitration clause could no more be revoked than could any other clause of a contract. Like any other contractual obligation it could be broken, and thereby a claim to damages would arise. But there was no right to rescind such a contract or contractual obligation. Section 1 of the Arbitration Act, 1889, relates merely to the right to revoke a submission."

Lord Esher, in *Re. Smith & Service and Nelson & Sons* (1) said at p. 550. "the phrase is used which had always been used, 'a submission shall be irrevocable'; that is to say, the power of the arbitrator cannot be revoked when he has once been appointed. It does not mean that the agreement to refer is irrevocable, because that always was in the true sense of the word irrevocable".

A distinction has been made in England between 'agreement to refer' and 'submission'.

(1) (1890) 25 Q.B.D. 545 (553).

(2) [1912] 3 K.B. 257 (270).

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatechand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.
v.
Fatechand
Murlidhar.

Banerjee, J.

This distinction has been maintained in our Act of 1940.

S. 12 (2) (b) provides: "Where the authority of an arbitrator is revoked . . . the Court may, on the application of any party to the arbitration agreement, order that the arbitration agreement shall cease to have effect with respect to the difference referred".

In this case counsel for the petitioner has told me definitely that he does not ask for an order under section 12 (2) (b). He asks for leave only under section 5.

In granting leave, the Court exercises its discretion, "which ought to be exercised in the most sparing and cautious manner, lest an agreement to refer, from which all might reasonably hope for a speedy end of strife, should only open the floodgates for multiplied expenses and interminable delays." [Per Lord Denmen, C. J., in *Scott v. Van Sandau*, (1)].

In *James v. James* (2) Stephen J. observed "I entirely concur with the judgment of my brother Denman. In this case of *Kirk and Randall v. East and West India Docks Co.* (3) I expressed an unqualified agreement with the opinion of my brother Grove, that before the Court exercises its discretion in giving leave to revoke a submission it should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal; and I have seen no reason to change my mind".

"An application for leave to revoke a submission is one to be granted with great caution." [Mathew, L.J., in *Belcher's case*, (4)] "To induce the Court to grant leave to revoke, a very strong case should be made out". [*James v. Attood*, (5) per Tindal, C. J.]

The law on this point is summarised thus in *Russell on Arbitration* (14th Edition) p. 45-6; "In considering the exercise by the Court of the power of revocation it must not be forgotten that arbitration is a particular method for the settlement of disputes. Parties not wishing the law's delays know or ought to know, that in referring a dispute to arbitration they take the

(1) (1841) 1 Q.B. 102 (110).

(2) (1889) 22 Q.B.D. 669 (674).

(3) (1886) 55 L.T. (N.S.) 245.

(4) (1901) 85 L.T. 468 (471).

(5) (1839) 7 Scott. 843.

arbitrator for better or worse, and that his decision is final both as to fact and law. In many cases the parties prefer arbitration for these reasons. In exercising its discretion cautiously and sparingly, therefore, the Court no doubt has these circumstances in view, and considers that parties should not be relieved from a tribunal they have chosen because they find they are likely to lose owing to the arbitrator's bad law, which they have agreed to be bound by".

It is difficult and undesirable to attempt to define the circumstances in which the Court should exercise its discretion. To do so would be to crystallise into a rigid definition that judicial power and discretion which the Legislature has for the best of all reasons left undetermined and unfettered. No hard and fast rule can be laid down. The discretion is to be exercised after appropriation and consideration of all the facts which are material for the purpose of enabling a judge to exercise a judicial discretion and after application of the right principles remembering that the parties have for better or worse agreed to make the arbitrator the final Judge in their dispute.

Russel states that the following are the chief grounds for granting leave to revoke (p. 46):

- (a) error of law, or excess or refusal of jurisdiction by arbitrator;
- (b) misconduct of arbitrator;
- (c) disqualification of arbitrator;
- (d) exceptional cases.

"A material consideration" says the learned author, (p. 43) "for the Court as to the order it will make on an application for leave to revoke is the time when the application is made. If it is made at an early stage of the arbitration proceedings, the court will more readily grant leave to revoke, assuming always that a good case for revocation is shown, [see the remarks of Kennedy, J. in *Re. Gerard (Lord) and London and North Western Railway Co.* (1)]."

(1) [1894] 2 Q.B. 915 (918).

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.
Fatehchand
Mulidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.Fatehchand
Murlidhar.

Banerjee, J.

The principles are thus well settled. The difficulty in exercising the discretion arises from the fact that in human affairs, there is infinite variety and no two cases are exactly the same.

I venture to put two limits within which the discretion is to be exercised; *one*, the court should not lightly release the parties from their bargain; that follows from the sanctity the court attaches to contracts; *the other*, that the court should be satisfied that a substantial miscarriage of justice will take place in the event of its refusal to grant the leave. The discretion has to be exercised within these limits. The petitioner's counsel asks me to give leave to revoke the authority of the arbitrator on the following grounds:

1. That there are difficult questions of law involved in the case and there is very great chance of the arbitrator making error of law and exceeding its jurisdiction.
2. Disqualification.
3. Exceptional circumstances.

To appreciate these points it is necessary to relate the facts. They may be shortly stated:

On 18th August 1949, the petitioner entered into a contract with the respondent to sell two lakhs yards of hessian cloth at Rs. 49/10/- per 100 yards, delivery September 1949.

The contract is in the standard jute contract form of the Indian Jute Mills' Association. In the contract there is an arbitration clause which is as follows:—

“All matters, questions, disputes, differences and/or claims arising out of and/or concerning and/or in connection with and/or in consequence of or relating to this contract whether or not the obligation of either or both parties under this contract be subsisting at the time of such dispute and whether or not this contract has been terminated or purported to be terminated or completed, shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted”.

In September, 1949, Great Britain devalued the pound sterling. An equivalent change in the value of the currencies of many other countries was declared. The Union of India being a member of the Commonwealth devalued the rupee with the pound on or about 21st September 1949. Pakistan has not done so. A disparity has arisen between the Pakistan and Indian rupee. According to the petitioner the result is that the jute trade has been adversely affected. Most of the jute grows in places which are now in Eastern Pakistan. There was a check on the free flow of jute from Pakistan. The price of raw jute therefore naturally went up: Jute dealers in India were not slow to take advantage of the situation. They entered into speculative contracts for the purchase and sale of jute. The price necessarily went further up; that is on the principle of more demand and less supply. It is further alleged by the petitioner that a deadlock in jute trade has taken place and in the events that have happened, there has been frustration of the contract; it has been impossible for the petitioner to fulfil the contract.

On September 22, the Government of West Bengal promulgated an ordinance which is called the West Bengal Jute Goods Futures Ordinance, 1949 (Ordinance No. V of 1949). The Ordinance was passed by the Governor of this Province in exercise of the power conferred on him by Section 88 of the Government of India Act, 1935. This section empowers the Governor to promulgate Ordinances during recess of Legislature, if the Governor is satisfied that circumstances exist which make it necessary for him to take immediate action.

The Ordinance in its preamble says that 'it is expedient and necessary to provide for the prevention of dealing in jute goods futures'.

'Jute' according to the Ordinance includes the fibre commonly known as Mesta; and 'jute goods' means hessian cloth made of jute or bags made of such hessian cloth; and gunny cloth made of jute or bags made of such gunny cloth and includes such other goods made of jute as the Provincial Government may specify by notification in the official gazette.

The relevant sections of the Ordinance are as follows:—

CIVIL

1950.

Bhuwalka
Bros. Ltd.v.
Fatchchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

2. In this Ordinance, unless there is anything repugnant in the subject or context,—

(1) "contract relating to jute goods futures" means a contract relating to the sale or purchase of jute goods made on a forward basis—

(a) providing for the payment or receipt, as the case may be, of margin in such manner and on such dates as may be specified in the contract, or

(b) by or with any person not being a person who—

(i) habitually deals in the sale or purchase of jute goods involving the actual delivery of possession thereof, or

(ii) possesses, or has control over, a godown and other means and equipments necessary for the storage and supply of jute goods

3. (c) notwithstanding anything contained in any other law for the time being in force:—

(i) every such contract made, and every claim in respect of margin, in contravention of the provisions of clause (a) shall be void and unenforceable, and

(ii) every such contract made prior to the date of publication of the notification shall be varied and settled on the basis of the last closing rate in a notified market.

Explanation—In this sub-section,—

(a) "last closing rate" means the rate fixed by the Directors of a notified market to be the closing rate of such market immediately preceding the date of publication of the notification under sub-section (1) prohibiting the making of contracts relating to jute goods futures; and

(b) "notified market" means a jute goods futures market recognised by the Provincial Government by notification in the official gazette.

It appears from a notification published in the Calcutta Gazette on 23rd September 1949, that the Provincial Government has recognised the following jute goods futures markets for the purposes of paragraph (b) of the explanation to sub-section (2) of section (3) of the Ordinance:

1. East India Jute & Hessian Exchange, Ltd., 43, Netaji Subhas Road, Calcutta.

2. Calcutta Wheat & Seeds Association, 149, Cotton Street, Calcutta.

3. The Indian Jute & Cotton Association, Ltd. 5/1, Royal Exchange Place, Calcutta.

It is alleged in the petition that the East Indian Jute & Hessian Exchange, Ltd., has fixed Rs. 145/14/- for 100 bags of 'B' twills and Rs. 51/4/- for 100 yards of hessian as the last closing rate in terms of the Ordinance: that other associations have fixed rates near about the said rates.

It is further alleged that the Indian Jute Mills' Association is a very influential body of jute mill owners and is affiliated to the Bengal Chamber of Commerce; that they are sister bodies having their offices at the same place and carry out a common policy in matters of trade in jute and jute products.

It is also alleged that a large number of local dealers in jute goods are members of an association called the Gunny Trades Association and that there is another Association called the Calcutta Jute Fabrics Shippers Association, in which shippers of jute goods are members.

In the petition it is said that these two Associations acting under the influence of the Indian Jute Mills' Association have decided that all contracts for October and December 1949 delivery, outstanding on the date of the devaluation should, if not fulfilled, be settled at the maximum ex-mill price plus a penalty of 7½% and as regards September delivery, the Associations fixed Rs. 61/8/- and Rs. 11/- as due date prices for 'B' twills and hessian respectively.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatechand
Murlidhar.

Banerjee, J.

On October 26, 1949, the Gunny Trades Association issued a circular (G56 of 1949) to the effect that the members of the Association should make all efforts to fulfil the contracts, and in cases of non-delivery of goods, the outstanding contracts (October/December delivery) entered prior to 10th October 1949 should be settled at the maximum ex-mill prices, plus a penalty of $7\frac{1}{2}\%$. It is stated in the circular that this scheme of settlement has the approval of the Indian Jute Mills' Association and the Calcutta Jute Fabrics Shippers Association.

It is also stated in the circular that in the case of a complaint being received by the Association of non-delivery of goods due to mal-practice, the matter will be referred for investigation to a sub-committee which will consist of the representatives of the said three Associations mentioned above and that in case of an adverse finding by the sub-committee, the name of the person in default would be liable to be placed on the disapproved list by all the three Associations.

Another circular (G62 of 1949) dated November 8, 1949 was issued by the Gunny Trades Association warning its members that violation of the directions in the other circular would be severely dealt with. The defaulters would be placed on the disapproved list. This circular also states that this step has been taken with the full knowledge and approval of the Indian Jute Mills' Association and Calcutta Jute Fabrics Shippers Association and any action against any party in default shall be enforced by all the three Associations.

There is no doubt these Associations are very powerful bodies in the jute trade and it is hardly possible for any jute trader to go against the directions or circulars of, or approved by, these Associations.

The petitioner has given delivery of a part of the contract goods but it has not fulfilled the contracts. The respondent sent to the petitioner a bill dated October 3, 1949 for Rs. 23,750/-. On 11th October, the petitioner paid a sum of Rs. 10,000/- and refused to pay the balance of the bill. According to the petitioner it has been discharged from further performance of the contract and this amount is not payable.

The respondent has referred the dispute to the Bengal Chamber of Commerce (case No. 842G of 1949) under the arbitration clause set out above. The tribunal called upon the petitioner to file its statements of defence against the claim.

It is alleged in the petition that almost all the members of the Bengal Chamber of Commerce who would be called upon to adjudicate on a jute dispute are members of one or the other Association; that these members are committed to a particular view of the matter namely that stated in the circulars which I have already summarised.

One of the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce is this:—

"The Tribunal shall consist of such members or assistants to members, and of such other persons who are from time to time on the panel of Special Advisory Boards to the Indian Jute Mills' Association, as may from time to time be selected by the Registrar as hereinafter mentioned and be willing to serve on the tribunal."

It is said that those who will constitute the court to decide the dispute are buyers and/or associated with or interested in the buyers and having regard to the circulars there is a great probability of the arbitrator being biased against the petitioner, and the petitioner does not expect to get justice from the Bengal Chamber of Commerce.

The petitioner adds that it never dealt in the sale or purchase of jute or jute goods involving actual delivery of possession of the goods. It further states that it does not possess or has control over any godown and other means or equipments necessary for the storage and supply of jute goods.

On these allegations the petitioner submits that the contract in question is a contract as defined by the Ordinance. The respondent denies the allegations and contends that the contract is not within the ambit of the Ordinance.

The petition then goes on to state that at the time when the parties entered into the contract they never contemplated that

CIVIL.

1950.

Bhuwarka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhūwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

there would happen such an exceptional situation arising out of the disparity between the Indian and Pakistan Currency.

In the affidavit in opposition it is denied that the devaluation has resulted in the dislocation of the jute trade or jute business: or that any difficult question of law will arise; it is said in any event the parties by the arbitration agreement had agreed to the question of law being decided by the arbitrators: there is no possibility of the arbitrator being biased: the Bengal Chamber of Commerce is a very respectable body; the petitioner will get proper justice from the arbitrator: under the rules of the Tribunal of Arbitration, Bengal Chamber of Commerce, the Registrar appoints the court and he will not appoint such persons as are interested in the dispute.

The respondent produced before me copies of two receipted bills to prove that the petitioner had given delivery of possession of goods to a certain party. To that the petitioner said that it was not delivery of actual possession of goods but of delivery order.

The respondent's counsel further said that assuming that raw jute did not arrive from East Bengal that does not affect the jute market. That seems to me untenable, for if raw jute cannot come surely jute goods market would be affected.

These are the main allegations in the petition and the affidavits. There are other allegations which will be noticed later in this judgment as and when necessary.

There is no denial in the affidavit in opposition that in the event of non-delivery, the contracts would have to be settled in the manner and at the rates directed by the said Association, as I have already stated.

Before I proceed to consider the merits of this case. I should deal with a preliminary objection taken on behalf of the respondent. The objection is that the application is premature; the arbitrator has not been appointed as yet.

Referring to section 5 of the Arbitration Act, respondent's

Counsel submits that the jurisdiction of the Court can be invoked only after the arbitrator is appointed and if arbitrator has not been appointed, there is no question of leave being given to revoke his authority.

According to counsel, in this case the arbitrator or arbitrators would be appointed when the Registrar of the Bengal Chamber of Commerce makes the appointment under the rules; the arbitrator is not the Bengal Chamber of Commerce but the court which is appointed by the Registrar.

Counsel says that the arbitration clause by itself does not name an arbitrator. There is an arbitration agreement but no arbitrator has been named, and he asks me to read the expression in the contract, "shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force", to mean, that, the matter shall be referred to the court to be appointed under the Rules, and not to the Bengal Chamber of Commerce. Counsel asks me to add the words "of the court appointed by the Registrar" between the words "Arbitration" and "of" in the expression "arbitration" of the Bengal Chamber of Commerce in the arbitration clause.

Counsel refers to the well-known case of *Chaitram Rambilas v. Bridhichand Kesrichand* (1), in which it has been held that where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce, the rules of the Association are imported into the contract and are binding on the parties.

For this proposition there was no necessity of citing a case. Because in this case the rules have been expressly incorporated. And it is not the case of petitioner's counsel that the rules are not binding.

The question is whether by the arbitration clause an arbitrator has or has not been named. Counsel for the respondent also refers me to rule 9 and other rules of the Tribunal and has drawn my attention to the words "appointed arbitrator" in the rules and asks me to hold that the appointed arbitrator is the court which the Registrar shall appoint.

(1) (1915) I.L.R. 42 Calc. 1140.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

I am unable to take the view that the arbitration clause does not name an arbitrator. In my view the "appointed arbitrator" is the Bengal Chamber of Commerce, though under the rules the Bengal Chamber of Commerce is authorised to delegate its power to a smaller body.

It is well known principle that an arbitrator cannot delegate his authority to somebody else without the consent of the parties concerned. If the rules were not expressly or by implication incorporated into the contract, the Bengal Chamber of Commerce would have no power to appoint a court by its Registrar to decide the dispute. But by incorporation of the rules into the contract the Bengal Chamber of Commerce has been authorised to appoint by its Registrar the court who actually will hear and decide the dispute.

From the case above cited, I quote the following observations of Jenkins, C.J. (p. 1144), "Even without the assistance of any authority it appears to me that these rules were imported into the contract and that without such importation the contract would be insensible so far as it related to arbitration. For it would involve the ridiculous position that every member of the Chamber of Commerce would have to sit on the arbitration."

A fluctuating body like the Bengal Chamber of Commerce with such a large number of members cannot be called upon to arbitrate a dispute. Things would be taken in a sensible way. The arbitrator appointed is the Bengal Chamber of Commerce. The parties agreed that the dispute "shall be referred to the arbitration of the Bengal Chamber of Commerce". The reference is to that Chamber, the proceedings are to be held under the rules of the Tribunal of Arbitration of that body. It has been admitted that the Bengal Chamber of Commerce is a registered body incorporated under the Indian Companies Act. It is therefore a definite person a legal entity to which reference can be made to decide disputes between parties. But the dispute is actually adjudicated upon by a court appointed under the rules of that Tribunal.

In *Ganges Manufacturing Co. Ltd. v. Indra Chand* (1), which has been approved in 42 Cal., Harrington J., made the following remarks (p. 1173). "I agree with the argument

(1) (1906) I.L.R. 33 Calc. 1169.

of the defendants that, where a dispute is referred to the award of a body of persons, who can sit as a Tribunal, then the arbitrators are not entitled to delegate their power to individuals. But in my opinion where a dispute is referred to an association consisting of a large and fluctuating body of persons, who cannot sit as a tribunal, it must be taken that the parties intend that that body shall carry out the arbitration in the only way in which it is possible to do so, viz., by individuals selected for that purpose."

CIVIL.

1950.

Bhuwarka
Bios. Ltd.

v.

Fatehchand
Mulidhar.

Banerjee, J.

In that case the contract contained an arbitration clause that any dispute arising out of the contract should be referred to the arbitration of the Bengal Chamber of Commerce. The Chamber under its rules appointed a court to decide the dispute which made the awards. An application was made to the court for confirmation of the award. It was objected on behalf of the defendants that the reference was to the chamber and that body had no power to delegate the functions of an arbitrator to the particular individuals. That objection was over-ruled. The objection would have been unnecessary if the reference was to the court which decided the dispute and not to the chamber. The question of delegation of authority was unnecessary to be discussed if the court was the arbitrator. I cannot think that eminent counsel who argued the case overlooked the point which has been now urged before me.

On these considerations I hold the preliminary objection has no substance and it must fail.

I now proceed to consider the merits of the case. On behalf of the petitioner, it is said, that the following difficult questions of law would arise in the arbitration proceeding and the questions should not be left to the arbitrator to decide: (1) Frustration; (2) applicability of the Ordinance to the contract under consideration, and effect of the Ordinance on the contract.

As to (1), petitioner's counsel has contended that on the facts of this case, the question of frustration is a difficult question. On the other hand, respondent's counsel says that no question of frustration arises in this case. The respondent in his affidavit does not admit that a deadlock has taken place between

CIVIL.

1950.

Bhuwarka
 Bros. Ltd.
 v.
 Fatchchand
 Murlidhar.

Banerjee, J.

India and Pakistan or that movement of Jute from East Bengal to West Bengal was in any way reduced at any material time. The respondent denies that there has been any disclocation in the jute or jute products market. The respondent denies that fulfilment of the contract outstanding on the date of devaluation became impossible of performance. The respondent further states that the petitioner partly performed the contract; payments have been made and received. Respondent's counsel produces a statement prepared by the Assistant Collector of Customs for Statistics to show that large quantity of jute has been imported into West Bengal from Pakistan. There are other allegations in the affidavit of the respondent on these lines. The respondent's counsel, therefore, submits that (a) in this case no question of frustration arises; (b) even if it arose, that is a simple question and is within the ambit of the arbitration agreement.

As to respondent's counsel's contention (a), I may point out at the outset that I am not finally deciding any question of fact in this application. I am not called upon to do so and I cannot do so on the affidavits. I am not deciding on this application whether there has been a deadlock or not or to what extent the jute market has been affected. All that I am doing is to get an idea of the facts that emerge out of the allegations in the pleadings before me to enable me to decide whether I should give leave to the petitioner to revoke the authority of the arbitrator.

As a Judge I am not permitted to refer to the remarks made by persons of authority elsewhere as to the effect of the devaluation on the jute trade. But even so, I cannot shut my eyes to the reports as appear in the news papers. I cannot shut my eyes to the reports of remarks made by Mr. Walker, Chairman of the Indian Jute Mills' Association on the present condition of the jute trade and the effort he is making to "solve the deadlock in jute trade", though I have covenanted with myself not to be in any way influenced by these reports. Assuming that the statement of the Assistant Collector of Customs is correct, there is nothing to show what percentage the quantity imported represents of the normal import.

I, perhaps, may refer to an article under the heading * *International "effects of devaluation"* in a quarterly journal of the

London Institute of World Affairs (Vol 4, No. 1) p. 22: "No more important event has taken place in the last few years in international affairs than the devaluation of the pound sterling. Although its final consequences cannot yet be seen, its immediate effects have been already a change in the whole pattern of world economic relations." According to the writer the total effects of devaluation of currencies has been completely to re-orientate world trade. As to India and Pakistan, the writer says "Devaluation has added increased bitterness to the dispute between India and Pakistan. India has devalued the rupee with the pound while Pakistan has not done so. Thus a disparity has arisen between the Pakistan and Indian rupee * * * Many Indian industries depend upon raw materials imported from Pakistan, notably the chief dollar earning Jute Industry. These raw materials will be greatly increased in price and so must result in an increase of the price of Indian Exports * * * Yet, so acute is the political problem that has arisen from Pakistan's refusal to devalue that trade is threatened with standstill between the two countries." I cannot ignore this statement made by an important person. Whatever may be the ultimate result of devaluation, there is no doubt that it did have a great repercussion on the Jute trade.

The question before me is what is the effect of that repercussion on the contract which I am considering. This leads me to consider respondents' counsel's argument. Counsel says that frustration is not a difficult question. He relies upon the observations of Das J. in *Balabux's case* (1) and in a judgment of the Court of Appeal *Chandanmull v. Clive Mills Ltd.* (2) and submits that the doctrine of frustration is not half as difficult in its application to a given set of facts as it is in the explanation of the legal theory on which it is based, and the question of frustration of commercial contract is specially well suited for decision by commercial men as arbitrators, particularly where the questions of law are dependent on questions of fact. In this case, says counsel, the question depends on certain questions of fact. The Chamber of Commerce is in a better position to deal with them than the Court.

The observations made by the learned Judges must be read in their context. As Das J. himself has pointed out, in the matter

(1) (1947) 51 C.W.N. 863.

(2) (1947) 52 C.W.N. 521.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

V.
Fatechand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatechand
Murlidhar.

Banerjee, J.

of *East India Cotton Mills Ltd.* (1) following *Quinn v. Leatham* (2) "Every judgment must be read as applicable to the particular facts of that case and that a case is only an authority for what it actually decides."

In the Weekly Notes cases, the facts were very simple. There it was alleged by the petitioner in those cases that the parties entered into the contracts on the basis and subject to the condition that the Jute Price Control Order would be continued after September 1946, and the rights and obligations of the parties would be governed and regulated by and be subject to the said order and that the continued existence of the said order and the selling price of jute were the foundations of the contract. The Jute Price Control Order however, was not extended. It expired on the 30th September 1946. It was contended in these cases that in the premises the contracts, automatically came to an end on the principle of frustration and the parties were discharged from further performances of the contracts, without any liability.

It is clear that a very simple question of fact was involved in those cases, namely, whether the parties had made the contracts on the assumption that the jute price control order would be extended to a particular date. On a fact like this, certainly the doctrine of frustration is a very simple one to apply. Take for example a case like this. A enters into a contract for sale of specific goods with B. Subsequently the goods without any fault on the part of the seller or the buyer perish. There cannot be any doubt that in this case frustration is a very simple point to decide. But can it be that in all cases it is a simple question and is easy of application?

In the words of Lord Simon in *Cricklewood Property case* (3) "Frustration may be defined as the premature determination of an agreement between parties, lawfully entered into and in course of operation at the time of its premature determination owing to the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law as striking at the root of the agreement, and as entirely beyond what

(1) (1948) 52 C.W.N. 534 (553).

(2) [1901] A.C. 495.

(3) [1945] 1 All. E.R. 252 (255).

was contemplated by the parties when they entered into the agreement."

The doctrine of frustration thus creates an exception to the rule as to absolute contracts. In *Constantine Line case* (1) Lord Porter says this: "Frustration is the term now in common use in cases in which performance of a contract becomes impossible because its subject matter has ceased to be available for the purpose for which both parties intended it to be used."

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatechand
Murlidhar.

—
Banerjee, J.

At p. 198 the learned Lord remarks: "The true principle seems to be not that all contracts must prime facie be performed whether performance be possible or not, but that there are some contracts absolute in their nature where the promisor warrants the possibility of performance. These he is bound to perform in any event or to pay damages. There are other cases, however, where the promisor is only obliged to perform if he can * * * In such cases; then, he is excused unless he be in fault. Of course, if he is in fault because his deliberate act has done away with the subject matter of the contract, and perhaps if he has been negligent, he cannot recover but prima facie he escapes. To make him liable his fault must be proved by the party who alleged that it destroys his excuse."

The reasonings of these observations seem to be based upon the extended meaning of the expression "Impossibility of performance of a contract" has obtained in recent years. In the same case, Lord Wright at p. 184 said: "I must briefly explain my conception of what is meant in this context by impossibility of performance, which is the phrase used by Blackburn, J. In more recent days, the phrase more commonly used is "frustration of the contract" or more shortly, "frustration." "Frustration of the contract," however, is an elliptical expression. The fuller and more accurate phrase is "Frustration of the adventure or of the commercial or practical purpose of the contract." This change in language corresponds to a wider conception of impossibility, which has extended the rule beyond contracts which depend on the existence at the relevant time, of a specific object, as in the instances given by Blackburn, J., to cases where the essential object does indeed exist, but its condition has by some

(1) [1941] 2 All. E.R. 165 (194).

CIVIL.

1950.

Bhuwalka
Bros., Ltd.

v.

Fatechand
Murlidhar.

Banerjee, J.

casualty been so changed as to be not available for purpose of the contract, either at the contract date or, if no date is fixed, within any time consistent with the commercial or practical adventure, for the purposes of the contract the object is as good as lost."

The classic theory and the one most commonly favoured in the past is the theory of the implied term. There are numerous cases in favour of this view but the best known is that decided by Lord Loreburn, [*Tamplin's case* (1)]. At p. 404, his Lordship said: "No court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which is not expressed was the foundation on which the parties contracted * * * * were the altered conditions such that had they thought of them, they would have taken their chance of them, or such that as sensible men they would have said "if that happens, it is all over between us"?"

The second theory, that of the disappearance of the foundation of the contract has been advocated amongst others by Lord Haldane.

The third theory, stated on two occasions by Lord Wright, is that the court imposes the just solution. His Lordship said in *Denny Mott's case* (2):

"It is the court which has to decide what is the true position between the parties. The decision is as Lord Sumner said "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances."

The court has formulated the doctrine by virtue of its inherent jurisdiction, just as it has developed the rules of liability for negligence, or for the restitution or repayment of money where otherwise there would be unjust enrichment. I find the theory of the basis of the rule in Lord Sumner's pregnant statement that the doctrine of frustration is really a device by which the rules as to absolute contracts are reconciled with the special exceptions which justice demands. The doctrine is invented by the court in order to supplement the defects of the actual contract."

(1) [1916] 2 A.C. 397.

(2) [1944] A.C. 265 (275).

(See The Law of Contract, Cheshire and Fifoot, 2nd edition P. 414-5).

In spite of this when I asked counsel as to whether in all cases the application of the doctrine of frustration is an easy one, his answer was in the affirmative. I then asked him to tell me whether in the following case, the contract was frustrated or not.

In 1939, the plaintiff, a music hall agent, entered into an agreement with the defendant, music hall artist by which the latter appointed the plaintiff as his manager for a term of 10 years on the usual terms that in consideration of the plaintiff's using his best endeavour to obtain engagements for the defendant the latter would pay the plaintiff a percentage of his earnings. The defendant was called upon for service in the army in 1940, where he served in the entertainment pool, and he was demobilised in 1946. During the War the parties continued to treat the contract, as nearly as they could as though it was still subsisting, and the defendant referred to the plaintiff as his manager, but after the War ended the defendant entered into a contract with other agents.

Counsel's answer was that the contract had not been frustrated. Yes, on these facts, Streatfield J. held that it had been frustrated because, "it involved the parties in a continuous relation involving efforts on both sides, and neither of them was able to carry out these efforts in the manner which was contemplated by them. In my view, to affirm their contractual adventure now, although it could not have been acted on, is to substitute a new contract." [*Morgan v. Manser* (1)]. The notes on this case in L.Q.R. Vol. 64 p. 179 show how difficult this doctrine is of application, which is said to be "a principle which has not as yet been fully defined and developed."

It follows, therefore, that there may be cases in which it is very difficult to say whether a contract has been frustrated or not, and may require careful consideration.

I think I have sufficiently illustrated the point I have been endeavouring to explain.

(1) [1948] 1 K.B. 185 (192).

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhūwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

Counsel for the respondent then said whether the question was difficult or not, it came within the arbitration agreement. That is so. There is no doubt about that. The arbitration clause has been couched in terms so wide as to cover this question but then the question is whether the Court should not in the circumstances of this case impose "the just solution" of Lord Wright: Whether the petitioner cannot say in this case that it never "warranted the possibility of performance" that events have happened for which it is not responsible, not negligent; it is not in fault, and therefore, it is entitled to be discharged from further performing the contract.

I should say on the facts of this case that it is a difficult question: We do not know exactly as yet as I have said what exact repercussion devaluation has or would have in the jute trade. Is it not right therefore that this question should be determined by the Court?

As to contention (2), of the petitioner's Counsel, namely, whether the Ordinance applies to the contract or not, the question seems to be more difficult. The respondent's Counsel, however, says that there is no difficulty at all. According to him, section 2 of the Ordinance has laid down what he has called "factual" tests. According to him the Chamber of Commerce is the most fit person to decide those questions of facts and to determine the question of applicability of the Ordinance to the contract under consideration. He said that once these tests are investigated and determined the rest becomes easy.

I do not think he is right there. Take for example, section 2(1) of the Ordinance which defines "contract relating to jute goods futures." It means a contract relating to the sale or purchase of jute goods made on a forward basis (a) providing for the payment or receipt, as the case may be, of margin in such manner and on such dates as may be specified in the contract. Counsel said that in this case, no margin has been specified in the contract, and therefore, this contract does not come within the purview of the Ordinance. Counsel refers to the bye-laws of the Indian Jute & Cotton Association Ltd., to explain what is meant by "margin specified in a contract" and what is done in connection with payment of margin and what happens for

failure to pay margin. But then there is sub-section (b), that is 2(1)(b) which I have set out in an earlier portion of this judgment. By that sub-section a contract is within the Ordinance which is by or with any person not being a person who habitually deals in the sale or purchase of jute goods involving the actual delivery of possession thereof.

What is the meaning of 'actual delivery of possession' in that sub-section? Counsel for the respondent said that it had the same meaning as delivery of goods within the meaning of section 33 of the Indian Sale of Goods Act. That section says that delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. The first part of the section says that delivery may be made by doing anything which the parties agree shall be treated as delivery. That presents no difficulty. The question is one of agreement between the parties. Where a dispute arises, the Court is called upon to do no more than ascertain what the agreement between the parties was. The second part of the section says that delivery may be made by doing anything which has the effect of putting the goods in the possession of the buyer. Delivery of the key of a godown or warehouse is symbolic delivery of the goods therein. Delivery of a key however, does not operate as delivery of the goods under the lock if it does not in fact give complete access to them. There are a number of illustrations given under that section. A sells to B 50 maunds of rice which are in his possession. A delivers them to B. Here there is delivery of actual possession. A sells to B 50 maunds of rice in the possession of C, a warehouse man. A gives B an order to C (called a delivery order) to transfer the rice to B, and C assents to such order, and transfers the rice in his books to B. This is also a delivery to B. Yet it is clear that in the second case, no actual delivery of possession was given as in the first case.

If framers of the Ordinance intended that the expression 'actual delivery of possession' in section 2(1)(b) of the Ordinance would mean the same thing as 'delivery of goods' in section 33 then why did he use different words?

In this case the respondent says that certain receipted bills

Civil.

1950.

Bhuwalka

Bros. Ltd.

v.

Fatechand

Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwarka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

of the petitioner show that the petitioner gave delivery of certain goods to certain person. But the petitioner contends there was no actual delivery of possession within the meaning of the Ordinance. In the receipted bills there are the words "Mills D.O. No. 11," shewing that delivery was made by means of a delivery order.

Is such delivery contemplated in the Ordinance or is it not? I have not been able as yet to formulate the answer. Again, there are the words in the section 'possesses' or 'has control over'. Does the "possession," or "control" refer to the point of time of making the contract, or the time of its performance or any other time. Suppose a person had in his possession a godown which he disposes of just before he enters into a contract, will that contract come within the ambit of the Ordinance? Or take another illustration, he gives up possession after the making of the contract and before the time of performance comes. Will the contract come within the Ordinance?

Very many questions like these arise. I have taken a few by way of illustration. Counsel for the respondent said to me that the Court should not introduce these difficulties. That is true. Yet the Court should not shut its eyes to the difficulties if there are. And certainly there are these difficulties.

I am not unmindful that whenever a document is couched in language which is clear and definite and no doubt arises in its application to the facts, there is no need to construe the document. The task of the Court is to make plain what is obscure and not to make obscure what is plain. Yet, can I in this case conscientiously say that the expressions which I have stated above are so clear that no doubt can be entertained? I cannot.

Therefore, there is no doubt that the true meaning of these expressions has got to be ascertained in the arbitration proceeding. This again is another difficult point of law that will arise in the arbitration proceeding.

But then, if these were the only questions involved in this case I would not be disposed to give leave to the petitioner to revoke the authority of the arbitrator.

The most important point in this connection that has been raised by the petitioner's counsel is that if the Ordinance applies, then there is no arbitration agreement at all, and therefore, the arbitrator would have no jurisdiction to decide the dispute. The petitioner's Counsel's submission on this point is this: by section 3(c) (ii), "Notwithstanding anything contained in any other law for the time being in force, every such contract (meaning a contract which comes within the purview of the Ordinance) made prior to the date of publication of the notification shall be varied and settled on the basis of the last closing rate in a notified market."

I have already stated in an earlier part of the judgment what according to the Ordinance a 'notified market' means.

Counsel relies on the case of *Luchminarain v. Hoare, Miller & Co.* (1) where Chaudhuri J., held that a mere extension of time did not operate so as to rescind the original contract. But where a new term for the inspection of the goods before delivery had also been introduced, the original contract was replaced by the new agreement, to which the arbitration clause in the original contract could not apply and on this ground the learned Judge refused to stay the proceedings under the Arbitration Act. Relying on this case petitioner's counsel said that by operation of section 3(c) (ii) of the Ordinance, the contract has been varied and nothing remains to be done under the contract save to settle it on the basis of the last closing rate in a notified market: there being this variation, the arbitration clause is gone. He said in a sense the dispute as to the setting of the contract in terms of the ordinance might be said to be a dispute arising out of the contract but that was not in the correct sense.

He relies on the observations of Pickford L.J., in *Monro's case* (2). In that case the question arose as to whether a suit for damages, on the ground that the plaintiff had been induced to enter into a contract by fraudulent misrepresentation should be stayed under the Arbitration Act. His Lordship said: "Nor do I think that it is an action in relation to or in connection with the contract. In one sense it is an action in relation to and in connection with the contract because if there had never been any

(1) (1913) I.L.R. 41 Cal. 35.

(2) [1915] 3 K.B. 167 (171).

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

V. *...*
Fatehchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

contract there would never have been any cause of action, there would never have been any representation and there would never have been any claim for damages. But it is not in relation to or in connection with the contract, in my opinion, within the meaning of the arbitration clause."

In this case also adopting that line of reasoning, petitioner's counsel submitted that if there was no contract, there would not have arisen the question as to whether or not the Ordinance applied to the contract and no question would arise as to whether sub-section 3 of the Ordinance applies, or whether the contract should be settled on the basis of the last closing rate in a notified market. But that according to counsel did not make the dispute a dispute arising out of the contract. This again, is a very difficult question of law and touches the jurisdiction of the arbitration.

In this connection counsel further submitted that it was not proper that the Court should leave such a question to be determined by the arbitrator, even though it may be that it comes within the ambit of the arbitration clause. Counsel referred me to the case of *Edward Grey & Co. v. Tolme and Runge* (1). There what happened is this:

"Before the outbreak of war, between England and Germany the plaintiffs contracted to buy from the defendants a quantity of sugar which was in Hamburg and which was to be shipped by the defendants. The contracts provided that in the event of Germany being involved in war with England they should be deemed to be closed, and that if war should prevent shipment any party should be entitled to go to arbitration. Owing to the outbreak of war the defendants were unable to ship the sugar, and the plaintiffs brought an action against the defendants, claiming a declaration that the contracts were suspended or dissolved and an injunction restraining the defendants from proceeding with arbitration. On an application by the defendants for an order that the action be stayed under section 4 of the Arbitration Act, 1889. *Held*, that as the question between the

(1) (1911) 31 T.L.R. 137.

parties was whether the contracts were alive or dead, it was in the Judge's discretion to say that it was not a proper question to be submitted to arbitration."

The remarks of Lord Justice Buckley at p. 138 are very instructive:

"The question between the parties was whether in the event which has happened the contracts were alive or dead. Then it has been said that even if the contract was dead the arbitration clause still survived. That question could not be determined now. He would assume against the plaintiffs, without deciding the question whether the arbitration clause was subsisting or not, that there might still be a case to go to arbitration. Still the question which remained was simply a question of law whether the contracts were suspended during the war or had been dissolved. In those circumstances he thought that it must be in the discretion of the learned judges to say that question was not a proper one to be submitted to arbitration, but should be decided by the Court and that therefore the action should not be stayed."

There is great force in this contention of learned counsel for the petitioner.

Suppose the application instead of being an application under section 5 of the Arbitration Act was an application for stay of proceedings under section 34 of the Act there is no doubt that the Court would apply the principle in *Grey's case* (1) and might not stay the suit.

The difference between an application under section 5 of the Arbitration Act and one under section 34 of the Act is a difference as to the point of time when the application is made. If proceedings are commenced in Court, application is made under section 34, if proceedings have not been commenced in Court, the application is made under section 5. The object of both the sections is same, namely, to prevent the arbitration. I do not see any reason why, therefore, I should not apply the principle in *Grey's case* (1) to the case before me.

(1) (1914) 31 T.L.R. 137.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.
Fatchchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

I repeat, in this application I have not decided nor profess to decide any question ultimately. I am only evaluating the facts and questions that may arise before the arbitrator in order to decide whether I should grant leave to revoke or not."

Unfortunately in India, there is not, as there is in England, a power given to the Court to direct the arbitrator to state any question of law arising in the course of the reference. Under our Act, the arbitrator may or may not do it. But in England, he is obliged to do it when the Court directs the arbitrator to do so. That is an additional consideration which has weighed with me.

The next point that has been canvassed before me is disqualification of the arbitrator. It is said that having regard to the event that have happened and the circulars issued, the arbitrator will be an interested party and the petitioner will not get justice from the arbitrator.

The law on this point is well settled. In *Bristol Corporation v. John Aird & Co.* (1) Lord Atkinson observed:

"My Lords, I do not think there is any dispute between the parties as to the law applicable to such a state of things. If a contractor chooses to enter into a contract binding him to submit the disputes which necessarily arise, to a great extent between him and the engineer of the persons with whom he contracts, to the arbitrament of that engineer, then he must be held to his contract. Whether it be wise or unwise, prudent or the contrary, he has stipulated that a person who is a servant of the person with whom he contracts shall be the Judge to decide upon matters upon which necessarily that arbitrator has himself formed opinions. But though the contractor is bound by that contract, still he has a right to demand that, notwithstanding those pre-formed views of the engineer, that gentleman shall listen to argument and determine the matter submitted to him as fairly as he can as an honest man; and if it be shewn in fact that there is any reasonable prospect that he will be so biassed as to be likely not to decide fairly upon those matters, then the con-

(1) [1913] A.C. 241 (247).

tractor is allowed to escape from his bargain and to have the matters in dispute tried by one of the ordinary tribunals of law. But I think he has more than that right. If, without any fault of his own, the engineer has put himself in such a position that it is not fitting or decorous or proper that he should act as arbitrator in any one or more of those disputes, the contractor has the right to appeal to a Court of Law and they are entitled to say, in answer to an application to the Court to exercise the discretion which the 4th section of the Arbitration Act vests in them, we are not satisfied that there is not some reason for not submitting this question to the arbitrator."

"In *Eckersley v. Mersey Docks & Harbour Board* (1) Lord Esher, M.R. said:

"In this case it is said on behalf of the plaintiffs that there is sufficient reason for the Court to say that the disputes in the action should not be referred to the engineer of the board, because he might be biased. It is not a sufficient reason to say that he might be biased, if the Court should be of opinion that there is no ground for supposing that he would be biased.

When the proposition sought to be established on behalf of the plaintiffs is examined, it comes to this that the disputes ought not to be referred to the engineer because he might be suspected of being biased although in truth he would not be biased. It is an attempt to apply the doctrine which is applied to Judges, not merely of the Superior Courts, but to all Judges—that, not only must they be not biased, but that even though it be demonstrated that they would not be biased, they ought not to act as Judges in a matter where the circumstances are such that people—not necessarily reasonable people, but many people—would suspect them of being biased. Is that a rule which can be applied to such contracts as this, where, as between the contractor and his principal, but parties agree that the chief servant of one of them shall be the arbitrator? If it was not for the agreement of the parties—if the rule applicable to Judges were to be applied—it is obvious that it would be impossible to say that the engineer, under whose superintendence the work has to be done, could act as arbitrator because some persons would suspect

Civn.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Baperjee, J.

(1) [1894] 2 Q.B. 667 (679).

CIVIL.

1950.

Bhuwarka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

him of being biased in favour of the parties whose servant he was. But that cannot be the case here, because both parties have agreed that the engineer, though he might be so suspected, shall be the arbitrator. A stronger case than that must, therefore, be shewn, if not that he would be biased, that at least there is a probability that he would be biased."

An arbitrator who has an interest dependent upon his decision is disqualified if either party at the time of his appointment was ignorant of the fact that this would be so, and the interest is of such a nature that it ought to have been disclosed. But if the parties, with full knowledge of the facts, selected an arbitrator who was not an impartial person, or who had to perform other duties which would not permit of his being an impartial person the Court would not release them from the bargain upon which they had agreed, and if a party to a contract submitted to the jurisdiction of a tribunal which had an interest of its own in the decision the court would not on that account, release him from the bargain, however improvident it was considered to be, so long as the Court was satisfied that he was aware or ought to have been aware of the terms of the bargain he had entered into.

There are many English cases which enunciated the principle I have stated above.

It seems that from a broader sense of justice in the English Arbitration Act, 1934, section 14(1) has been enacted which over-rules these decisions in so far as they decide that because a party knew at the time when he made the agreement or ought to have known that the arbitrator named might not be impartial or had some interest in the subject matter he could not come afterwards to the Court and complain of the person to whose appointment he had agreed (*Russell p. 387*).

In England, therefore, the Court at present will not refuse an application to revoke a submission or to stay an arbitration on the ground that a party knew or ought to have known that the arbitrator by reason of his relation towards any party to the agreement or his connection with the subject matter referred, might not be capable of impartiality (*Russell p. 37*).

There is no such section in our Act of 1940. Yet I think we can adopt the principle underlying the English section for the purpose of doing substantial justice.

It is the most fundamental principle of justice that a judge or a tribunal should not decide a dispute if there is a probability that he would be biased in the case.

In this case, is there such a probability? The facts on this point are these: it is said in the petition (paragraph 5). "The Indian Jute Mills Association which is a very influential body of jute mill owners is affiliated with the Bengal Chamber of Commerce. They are sister bodies having their offices at the same place and carry out a common policy in matters of trade in jute and jute products."

This paragraph is dealt with thus in the affidavit in opposition. I admit the statements contained in the first sentence of paragraph 5 of the petition. I do not admit the statements contained in the second sentence of the said paragraph.

It is therefore clear that it is admitted that the Indian Jute Mills Association is a very influential body and is affiliated to the Bengal Chamber of Commerce. But it is not admitted that they are sister bodies or have their offices in the same place or carry out a common policy in matters of trade in jute or jute products. The respondent's denial of the facts stated in paragraph 5 of the petition is of an evasive character and I cannot place much reliance on it. There is no doubt that they have offices in the same place. It is not disputed that the persons who would be called upon to decide the dispute in question are either members of one or other of the three Associations or their assistants whose names are on the panel of Special Advisory Board to the Indian Jute Mills Association. It is only natural that the Bengal Chamber of Commerce should have the same policy in Jute trade as the other three important jute associations.

On the affidavits, I have no doubt that the policy formulated in the circulars would be the policy of the Bengal Chamber of Commerce. Not to recognise that is to shut our eyes to the reality of things.

CIVIL.

1950.

Bhuwalka

Bros. Ltd.

v.

Fatechand

Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwarka
Bros. Ltd.

v.

Fatechand
Murlidhar.

Banerjee, J.

I find in the rules of the Tribunal of Arbitration Bengal Chamber of Commerce that the Registrar shall select as arbitrator or umpire as the case may be so far as possible, persons having a practical knowledge of the subject matter of the contract. Now, who are the persons who would be selected to decide the present dispute? Naturally, the persons who are connected with the jute trade. And who are the most important persons connected with the jute trade? Practically they are members of or connected with the three associations named as above or their managers or assistants.

It is not possible for me to say that the arbitrator will in fact be biased and it is not necessary for me to say that. Here lies the difference between an application for leave to revoke the authority of an arbitrator or to stay an action under section 34 and an application for setting aside an award on the ground of bias. In the first two applications, all that is necessary is to show that there is a probability of bias or a reasonable prospect of bias or as Mr. Justice Sinha has put it in a very recent case (judgment delivered on 14th March last *Re: Arbn. Oswal Trading Co. v. Amar Chand & Co.*) there is a reasonable apprehension of bias. This difference arises from the very nature of the applications.

"A perfectly even and unbiassed mind is essential to the validity of every judicial proceeding. Therefore, where it turns out that, unknown to one or both of the persons who submit to be bound by the decision of another, there was some circumstance in that situation of him to whom the decision was intrusted which tended to produce a bias in his mind, the existence of that circumstance will justify the interference of the Court. Whether in fact the circumstance had any operation in the arbitrator must, for the most part, be incapable of evidence and may remain unknown to every human being, perhaps even unknown to himself. It is enough that such a circumstance did exist [see the remarks of Sir John Stuart, *V. C. Kemp v. Rose* (1)].

But it is said referring to *Balabux's case* (2) that Das J. in similar circumstances negated the existence of any possibility of

(1) (1858) 1 Giff. 258 (2645).

(2) (1947) 51 C.W.N. 863.

bias on the part of the Bengal Chamber of Commerce. His Lordship observed at p. 874. "It is not out of bounds of possibility that situation may sometime arise in a trade which will divide person engaged therein into two opposite groups and if such situation does arise the Court will certainly take that into consideration." With this observation his Lordship proceeded to scrutinise the allegations in the pleadings before him. In the first place, he observed, the affidavit in opposition had not been verified in the way required by a recent decision of the Appeal Court, *Hafiz Shamsed v. Chattoo*, (1). His Lordship observed "it is not clear whether the allegations are statements of facts true to the knowledge of the deponents or based on information received from any particular source or any mere expressions of apprehensions, real or pretended." His Lordship then scrutinised a list of names that was placed before him. His Lordship further observed: "The Registrar of the Tribunal appoints the arbitrator for particular cases. The rules of the tribunal make it clear that the Registrar shall not appoint any person who for any reason within his knowledge would not be a proper person to act as arbitrator. I have no reason to assume that the Registrar will violate this salutary rule." His lordship also scrutinised the affidavit in reply in which it was denied that any person was or would be appointed to act as arbitrator who had any connection with any party to the agreement or was interested in the subject matter referred.

On the evidence before him and on a consideration of the pleading before him his Lordship was unable to come to the conclusion that there was any probability of bias in the mind of the arbitrator which entitled the petitioner to have stay of the suit under section 34 of the Arbitration Act.

His Lordship concluded: "The Bengal Chamber of Commerce has gained a reputation for the excellence of their arbitration proceedings and I shall require much more specific averments of facts properly verified showing that in any particular case justice will be denied by the Bengal Chamber of Commerce to any party."

It is clear, therefore, that if there were averments of facts properly verified his Lordship's judgment would have been differ-

(1) (1941) 46 C.W.N. 474.

Civil.

1950.

Bhuwalka
Bros., Ltd.

Fatechand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatchchand
Murlidhar.

Banerjee, J.

ent. I was one of the counsel in that case. It is still fresh in my mind what happened in that case. It was our fault that we lost in that application. We did not take enough care to see whether the verification had been properly made.

Be that as it may, the observations were made by Das J. in March 1947. We know that thereafter the Chamber of Commerce made certain awards in which it granted damages on illegal basis. Some of these awards have been set aside by my brother Sinha J. I know at least in two cases his Lordship's judgment was upheld by the Court of Appeal. This can be checked from the records of this Court. I do not say for a moment that the Chamber of Commerce or the arbitrator appointed to decide the dispute deliberately did the mischief. But there is always an element of unconscious influence over the mind where self interest is in action. Self interest is a point factor in human nature. When in action, it dominates all other considerations. Pious platitudes then have little chance against this supreme reality of human nature. That, I believe, is the consideration which induced great Judges to lay down the principle that where some circumstance exists in situation of an arbitrator or Judge which tends to produce a bias in his mind, he should not act as an arbitrator or Judge as the case may be in the matter concerned.

On the evidence before me in this case. I am not at all satisfied that there is no probability of the arbitrator being biassed.

I should here observe that there are certain matters in the procedure of the tribunal, which in the exceptional circumstances of this case, may be taken into consideration. The tribunal consists of such members or assistants to members who are from time to time on the panel of Special Advisory Boards to the Indian Jute Mills Association. The name or names of the person or persons constituting the court are not ordinarily disclosed to the parties nor are they entitled to such information as of right. Then again, it is entirely at the discretion of the Court to permit the parties to appear by counsel, attorney or other advocate or adviser. In a case, where issues like these which I have already foreshadowed arise, I apprehend it is of great importance that

the parties should have legal assistance in the conduct of their cases. It may be said that the parties with eyes open agreed to submit to the arbitration of the Bengal Chamber of Commerce under its rules and it is not for them now to complain against these rules. That is true. But in this case the circumstances are also special. At the time of making the contract, could the parties foresee that there would be devaluation of pound sterling the "final consequences of which cannot yet be seen, though its immediate effects have been already a change in the whole pattern of world economic relations." Could the parties foresee that there would be disparity between the Pakistan and Indian rupee? Could they foresee that as a result thereof there could be check in the free flow of Jute from East Bengal to West Bengal? Could they foresee the promulgation of the Ordinance and the results consequent all thereto?

Is it not his case where the Court is required to intervene and impose the just solution of Lord Wright? Can it not be said in this case that the seller never warranted the possibility of performance? Is it not a case where the seller only said that it would perform the contract if it could? All these various considerations do arise. It is the Court which can give the necessary relief and not an arbitration tribunal. These exceptional circumstances, in my mind, make a great difference between this case and other cases.

I venture to think that in the nature of things change is inevitable in all human affairs. When the parties enter into a contract they do so on the basis that a change may happen. If changes which are within the reasonable contemplation of parties at the time of making the contract take place, the parties cannot get rid of their bargain on the plea that changes have taken place which in fact they did not contemplate, but if the changes that take place are so great as to be beyond the possibility of any human contemplation, the court has certainly to consider whether it would be just and equitable to enforce the contract, which may result in unjust enrichment.

On a careful consideration of these matters, I think I should give leave to the petitioner to revoke the authority of the appointed arbitrators. In doing so, I have not overlooked the

CIVIL.

1950.

Bhuwarka
Bros. Ltd.

v.

Fatechand
Murlidhar.

Banerjee, J.

CIVIL.
 —
 1950.
 Bhuwalka
 Bros. Ltd.
 v.
 Fatehchand
 Murlidhar.
 —
Banerjee, J.

fundamental principle that the court should be very cautious before it uses its power under section 5. I have kept that principle throughout in view while considering the facts of this case. I have not overlooked that the parties must be held to their bargain, whether it is wise or unwise, prudent or imprudent. It would be contrary to justice to give leave to revoke the authority of an arbitrator to a party who as a consideration of the contract, had agreed to submit his disputes, whether on law or fact which might arise, to his (arbitrator's) arbitration.

The ground that an arbitrator may commit a mistake in law is not by itself sufficient to induce the court to revoke the authority of an arbitrator, for the parties agreeing reference took the arbitrator for better or worse. The court must be satisfied that unless leave is granted substantial miscarriage of justice will take place. Lastly, I have balanced the convenience and inconvenience of the parties, I have also considered the mischief, I shall do, if this judgment is wrong.

What the petitioner says is that before the tribunal it would not get any justice. What the respondent says is that if the parties are not held to their bargain, there would be delay in getting his dues and that if he is driven to the court of law, he would have to incur more costs than before the tribunal.

I do not arrogate to myself infallibility. It may be that I have given a wrong judgment. But I consider that before everything it is important that parties get adjudication of their disputes in an impartial tribunal, and in the situation of which no circumstance exists which tends to produce a bias in its mind.

The respondent, if he is so advised, may file a suit in this court. I have not the slightest doubt that suitable directions will be given for expedition of the suit. As to costs, it may be that only a few suits will be instituted, which would be brought as test cases. Before myself, there were 5 petitions but only one of them was seriously argued. In the few test cases that may be filed persons interested may combine and contribute to the costs of the litigation. Ultimately they get cheaper justice in Court.

On the whole therefore, it does not seem to me that the consideration in favour of the respondent can outweigh the consideration in favour of the petitioner.

I, therefore, as I have said, grant the leave, but having regard to all the circumstances of the case, I direct that the parties do pay their own costs. It is nobody's fault that the circumstances are to-day what they are. It is nobody's fault that they could not foresee that has happened today.

In conclusion, I must acknowledge my gratefulness to counsel in this case who have very ably argued it.

After the judgment had been delivered, respondent's counsel asked me to revoke the submission. Counsel said that the respondent was not asking for revocation but having regard to the prayers in the petition it is the duty of the Court to revoke the submission. The petitioner made several prayers.

The act makes a distinction between revocation of the authority of the arbitrator and revocation of the submission. Section 5 provides for the first. Section 12(2) (b) for the second and is in these words:—

“Where the authority of an arbitrator or arbitrators or an umpire is revoked by leave of the Court, or where the Court removes an umpire who has entered on the reference, or a sole arbitrator or all the arbitrators, the Court may on the application of any party to the arbitration agreement, either (a) appoint a person to act as sole arbitrator in the place of the person or persons displaced, or (b) order that the arbitration agreement shall cease to have effect with respect to the difference referred.”

On the day when this application was opened, petitioner's counsel definitely told me that he was not asking for an order under Sec. 12(2) (b) and gave up the prayer for revocation of the submission. None of the parties present at that time raised any objection to that. It is not for the Court to enter into the reasons why a plaintiff or a petitioner presses for some reliefs and abandons others. The Court has only got to decide the case

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

CIVIL.

1950.

Bhuwalka
Bros. Ltd.

v.

Fatehchand
Murlidhar.

Banerjee, J.

as presented before it. Yesterday respondent's counsel told me that I should revoke the submission, so that he might get an opportunity of preferring an appeal from my judgment. I have always considered it my duty to see that I do nothing to hamper an appeal from my judgment, but that does not mean that I should do something illogical or not warranted by the procedure of the Court. If the petitioner does not want a relief I do not see how I can force the relief on the petitioner. In this case I told respondent's counsel that if the respondent wanted it, at his instance I was prepared to revoke the submission, but respondent's counsel said the respondent did not want revocation of the submission.

There seems to be another difficulty arising on respondent's counsel's submission. It is a small point and a technical point but the point is there. It is this that submission is revoked where the authority of an arbitrator is revoked by leave of the Court. In this case I have granted leave to the petitioner to revoke the authority I do not know whether the petitioner has revoked the authority. There is nothing on the record to show that it has revoked the authority.

Discretion is given to the Court on the application of any party to the arbitration to make orders under section 12(2) (a) or (b). That shows that certain facts have got to be placed before the Court. The petitioner, as I have said did not press for revocation of the submission. Naturally, therefore, the petitioner did not place the facts on which the Court should or could revoke the submission. No fact has been placed before me in support of the prayer for revocation of submission except that respondent desires to prefer an appeal from my judgment. I cannot accede to the respondent's counsel's prayer.

Messrs. Khaitan & Co.: Solicitors for the Petitioners.

Messrs. P. D. Himatsingha & Co.: Solicitors for the Respondent.

S.K.R.C.

*Leave to revoke the authority
of an arbitrator granted.*

Before Mr. Justice S. R. Das Gupta.

ELBRIDGE WATSON

v.

R. K. DAS.*

Constitution of India, Art. 226—Scope of Art. 226—“Amount due” in Sec. 46(5) (a) of the Indian Income Tax Act (Act XI of 1922), meaning of—Bar of suits under section 67 of the Indian Income Tax Act—Retrospective effect of Art. 226 of the Constitution—Arts. 225 and 372 of the Constitution considered—What is an adequate legal remedy—The power of revision by the Commissioner under section 33A of the Income Tax Act, if an adequate legal remedy.

CIVIL.

1950.

November, 28.

A certificate was issued by the respondent against the petitioner for income tax payable by the petitioner and under section 46(2) of the Income Tax Act and it was forwarded to the Certificate Officer of Alipore, 24 Parganas under Bengal Public Demands Recovery Act, 1913. A notice of attachment under section 46(5) (a) of the Income Tax Act was issued by the respondent and served upon the employer of the petitioner. Thereafter an application being made by the petitioner before the Certificate Officer, and by an order the Certificate Officer allowed the petitioner to pay his dues by instalments. After the order was passed by the Certificate Officer the petitioner applied to the respondent asking him to withdraw the notice under section 46(5) (a) of the Income Tax Act. The said application is purported to have been rejected by the respondent of which the petitioner had no knowledge.

Held: (i) The expression, “amount due” in section 46(5) (a) of the Income Tax Act in this case must mean the amount of instalment as and when they become due.

(ii) The Art. 226 is unfettered and the powers conferred by the Art. 226 are not subject to any restriction imposed by any existing law or to be imposed by any future enactment.

(iii) The power conferred by Arts. 226 of the Indian Constitution are not subject to the restriction imposed by the Prohibition of the Section 67 of the Income Tax Act and same cannot override or control the provisions of Art. 226 of the Indian Constitution.

* Matter No. 48 of 1950. In the matter of an application under Art. 226 of the Constitution of India and in the matter of Arts. 13 and 31 of the Constitution of India and in the matter of clauses 4 and 21 of the Charter of the Supreme Court and in the matter of section 45 of the Specific Relief Act.

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

(iv) Under Art. 226 of the Indian Constitution powers have been given to the High Court to issue to any person in authority orders or directions for enforcement of fundamental rights and there is no question of taking any rights which have been already vested.

(v) If there is an adequate legal remedy provided in the Statute itself, then the High Court should not interfere under Art. 226 of the Indian Constitution. But the remedy in question must be a specific remedy at law which is not less convenient, beneficial and effective.

(vi) The remedy provided by Section 33A of the Indian Income Tax Act is not an adequate legal remedy.

Application by Elbridge Watson for a Writ of Mandamus or an order directing the respondent R. K. Das, an Income Tax Officer to show cause why the orders complained of and dated the 18th March, 1949 be not set aside and quashed.

The material facts will appear from the judgment.

Dr. Radha Binode Pal for the Petitioner.

Mr. F. C. Meyer for the Respondent.

The judgment of the Court was as follows:—

November, 28.

S. R. Das Gupta, J.—This is an application by one Mr. Elbridge Watson for a writ of mandamus or a writ of like nature or an order directing the respondent Sri R. K. Das, an Income Tax Officer to show cause why the orders complained of and dated the 18th March, 1949 should not be set aside and for quashing the said orders.

The case of the petitioner before me is as follows:

The petitioner, an American citizen by birth, is a citizen of India and thereafter of the Union of India for about 16 years.

The petitioner is the Manager and Director of Messrs Chrestian Mica Industries Ltd. The total income which the petitioner gets from the said company is the net sum of Rs. 60,000/- to Rs. 70,000/- annually after deducting the income

tax payable by him. On the 22nd October 1948, the petitioner was assessed as income tax for assessment year 1946-7. The tax assessed was Rs. 5,30,526/- and after crediting the sums of Rs. 50,252-11-0 and Rs. 12,616-4-0 realised by the respondent, a sum of Rs. 4,67,657-1-0 became due and payable by the petitioner to the income tax authorities. On the 18th November 1948, the respondent caused a notice of attachment under Section 46(5A) of the Income Tax Act, 1922 to be issued and served upon the Chrestian Mica Industries Ltd., the employers of the petitioner. By the said notice of attachment the said Messrs. Chrestian Mica Industries Ltd. were required to pay to the respondent forthwith and money due from them to the petitioner or held by them for or on account of the petitioner and also to pay any money which may become due to him or any money which the said Messrs. Chrestian Mica Industries Ltd. may subsequently hold for or on account of the petitioner within the next three months. On the 21st December 1948, the respondent forwarded to the office of the Certificate Officer, 24-Parganas, Alipore a certificate for Rs. 4,67,657-1-0 under Section 46(2) of the Income Tax Act for recovery of the said sum by the Certificate Officer under the Bengal Public Demands Recovery Act 1913. The said certificate was filed with the Certificate Officer, 24-Parganas, Alipore and the case was numbered and registered as No. 201 I.T. of 1948-49. After having forwarded to the office of the Certificate Officer, 24-Parganas the certificate as aforesaid, the Income Tax Officer on the 18th March 1948, caused another letter of attachment to be served upon the employers of the petitioner namely, Messrs. Chrestian Mica Industries Ltd. and caused an attachment to be effected under section 46(5A) of the Indian Income Tax Act. By the said notice Messrs. Chrestian Mica Industries Ltd. were required under Section 46(5A) of the Income Tax Act, 1922, to pay to the respondent forthwith any amount due from them to the petitioner or held by them for or on account of the said petitioner up to the amount of arrears shown in the said letter which was Rs. 3,37,345-5-0 and also requiring the said Messrs. Chrestian Mica Industries Ltd. to pay any money which may subsequently become due from them to the petitioner or which they may subsequently hold for or on account of him up to the amount of arrears still remaining unpaid. Thereafter on the 28th December 1949, the petitioner made an application to the Certificate Officer for payment of his dues in monthly instalments. The said application was not disposed of but kept pending at the

Civil.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

instance of the respondent. On the 25th May 1950, another application was made to the Certificate Officer and on that application an order was made allowing the petitioner to pay his dues in monthly instalments of Rs. 5,000/- each, the first of such instalments being payable on the 15th June 1950 and subsequent instalments by the 15th of subsequent months. The material portions of the order passed by the Certificate Officer run as follows:

"I do not understand why a petition for instalment as submitted by the C. D. should have been kept hanging like this at the instance of the I. T. O."

"I permit the C. D. to pay for the present at the rate of Rs. 5,000/- per month each payment being made by the 15th of each month. The rate of instalment is, however, liable to be reconsidered and refixed on the right of future developments. The first payment is to be made by 15-6-50. Also write to I. T. O. for information re: other payments that may have since been made by him."

Thereafter on the 30th May 1950, the petitioner through his advocate made an application to the respondent asking him to withdraw the notices under Section 46(5A) of the Income Tax Act. In the said application it was *inter alia* stated as follows:

"I have the honour to state that by an order of the Certificate Officer in Certificate Case No. 201 I. T. 1948-49, the learned Certificate Officer has been pleased to grant me instalments of Rs. 5,000/- per month."

"I would therefore request you to withdraw all notices under Section 46(5A) which you have issued for the realisation of the aforesaid dues so that my client abovenamed may be able to make the payments according to the instalments granted and that he may have something to live upon."

Nothing was done regarding the said application and the said application has been kept pending since May 1950 and no order on the same to the knowledge of the petitioner has been

passed by the respondent, but the respondent in his affidavit in opposition has stated that the same was rejected on 5th June 1950. Under the circumstances the petitioner has made the present application for the reliefs mentioned.

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

Dr. Pal, appearing on behalf of the petitioner contended before me that in view of the order passed by the Certificate Officer on 25th May 1950 granting instalments the respondent should either withdraw the attachment which had been made on the 18th March 1949 or at least modify the same. He relies on Section 46(5A) and contends before me that in any event the attachment which has been effected by the notice of the 18th March 1949, should be revised to this extent, namely, that the employers of the petitioner should be asked to pay Rs. 5,000/- per month being the amount of instalments which has been ordered to be paid by the Certificate Officer and it is incumbent on the Income Tax Officer to do so.

It is necessary for me, in order to determine this matter, to consider the effect of Section 46 and particularly Section 46(5A) of the Income Tax Act. The material provisions of Section 46 necessary for me to consider are as follows:

46(2). "The Income Tax Officer may forward to the Collector a certificate under his signature specifying the amount of arrears, due from an assessee; and the Collector on receipt of such certificate, shall proceed to recover from such assessee, the amount specified therein as if it were an arrear of land revenue."

Provided that without prejudice to any other powers of the Collector in this behalf, he shall for the purpose of recovering the said amount have the powers which under the Code of Civil Procedure, 1908, a Civil Court has for the purpose of the recovery of an amount due under a decree."

46(5A). "The Income Tax Officer may at any time or from time to time, by notice in writing (a copy of which shall be forwarded to the assessee at his last address known to the Income Tax Officer) require any person from whom money is due or may become due to the assessee or any

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das, Gupta, J.

person who holds or may subsequently hold money for or on account of the assessee to pay to the Income Tax Officer, either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the tax payer in respect of arrears of income tax and penalty or the whole of the money when it is equal to or less than that amount.

"The Income Tax Officer may at any time or from time to time amend or revoke any such notice or extend the time for making any payment in pursuance of the notice."

The point which specifically arises for my consideration is what would be the "amount due" as mentioned in Section 46(5A) of the Income Tax Act? Is it, in the present case the whole of the amount which is payable to the Income Tax Authorities by the petitioner, viz. Rs. 3,37,345-5-0 or is it Rs. 5,000/- per month as and when the instalments become due?

Dr. Pal contended before me that the Income Tax Officer should either withdraw or amend his notice so as to make it consistent with the order for payment by instalments which has been due. In other words, he should in any event direct the debtors of the assessee to pay at the rate of Rs. 5,000/- per month. The expression "the amount due" appearing in Section 46(5a) according to him, must mean the amount which becomes "due for payment"; in other words the amounts of the instalments as and when they fell due.

Mr. Meyer appearing on behalf of the respondent on the other hand contends that "the amount due" must mean the whole of the amount for which the assessee has been assessed by the Income Tax Officer which has to be paid.

I have carefully considered this matter but I cannot accept Mr. Meyer's contention and I accept the contention of Dr. Pal on this point. It seems to me that after the Certificate Officer has allowed instalments at Rs. 5,000/- per month, the assessee has the right to pay only Rs. 5,000/- per month and the Income Tax Authorities would be under an obligation to take, so long that

order stands, only at such instalment. If that is so, then the Income Tax Officer cannot direct the debtors of the assessee to pay anything more than at the rate of Rs. 5,000/- per month and it was incumbent on the Income Tax Officer at least to amend his notice accordingly. The position it seems to me, would be entirely anomalous if, on the one hand the Collector, who is authorised to do so, allows the assessee to pay in certain instalments, but the Income Tax Officer issues notices for payment of the entire sum all at once. The result in that case is that an order passed by the Collector granting instalments is nullified by the order of attachment passed by the Income Tax Officer. The interpretation which Mr. Pal asks me to put on the section seems to me to be the only sensible and logical interpretation to put upon it. The expression "amount due" in this case to my mind must mean the amount of instalments as and when they become due. The use of the words "in respect of" after the words "the amount due by the tax payer" and before the words "arrears of income tax and penalty" also supports the contention of Dr. Pal. If that is so, then in my opinion it was incumbent on the Income Tax Officer to revise the order which had been made by him on the 18th March 1949, so as to make it consistent with the order passed by the Certificate Officer, 24 Parganas.

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

Mr. Meyer then contends that this application is not maintainable in view of the provision of Section 67 of the Indian Income Tax Act. Section 67 of the Indian Income Tax Act runs as follows:

"67. Bar of suits in Civil Court—No suit shall be brought in any Civil Court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any officer of the Government for anything in good faith done or intended to be done under this Act."

Mr. Meyer contends that the provisions of this section of the Income Tax Act is a bar to any suit, prosecution or other proceedings unless it can be shown that the act complained of was done in bad faith. Mr. Meyer pointed out to me that there was hardly any allegation, far less any satisfactory proof,

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

of any bad faith on the part of the Income Tax Officer in making the said order. If that is so, then Mr. Meyer contends that this application is not maintainable. In support of his contention he cited before me the decision of Bachawat J. in *Pragdas Mathuradas v. Income Tax Officer, Central Circle I, Calcutta*, (1) and on the strength of this authority contended that the provisions of section 67 of the Indian Income Tax Act is a bar to the maintainability of the present application.

Dr. Pal appearing on behalf of the petitioner on the other hand contends that the application before me is under section 226 of the Indian Constitution and section 226 of the Indian Constitution cannot be subject to the provisions of the Indian Income Tax Act. In other words he contends that section 226 of the Constitution gives to the High Court very wide powers which cannot be fettered by any provisions of any Act.

The circumstances under which the Court can interfere with an action of the executive has been the subject-matter of decision by the Court of Appeal of this Court. Mr. Justice Banerjee sitting with Chief Justice Harries in a recent decision carefully laid down the principles on which this Court can interfere with the action of the executive. In *Amulya Pal v. R. N. Roy*, (2) Banerjee J. observed as follows:

"The respondent must act within the four corners of the authority given him by the Act and cannot act beyond that authority."

In the subsequent case of *Patri Shaw v. R. N. Roy*, (3) Banerjee J. again observed as follows:

"The only question before the Court when the matter is brought before it, is to see whether (1) the order has been made by a competent authority; (2) whether that authority has acted within the four corners of the powers committed to it; (3) whether it has acted honestly. If the Court answers these questions in the affirmative, the Court has no jurisdiction to interfere with any order made by such authority.

The Court has nothing to do with the rightness or wrongness of the order."

(1) (1950) 86 C.L.J. 77.

(2) (1950) 54 C.W.N. 850.

(3) (1950) 54 C.W.N. 855.

The net result of the decisions to which I have just now referred is that the Court can interfere if the act complained of does not come within the four corners of the Act. It can also interfere if the act complained of is malafide. But in the absence of either of those two conditions the Court has no authority to interfere with the action of the executive. The Court cannot, as Mr. Justice Banerjee pointed out question the rightness or the wrongness of the order complained of. The two decisions which I have just now cited relates to the provisions of the West Bengal Securities Act (Act III of 1948). Section 34 of the said Act contains exactly similar provision as that of Section 67 of the Indian Income Tax Act. I should have mentioned that Mr. Meyer drew my attention and laid emphasis upon the words "intended to be done" appearing in Section 67 of the Income Tax Act, but I find that the same words were also used in the West Bengal Securities Act which came to be considered in the two decisions which I just now cited. It does not seem to me that the two decisions to which I have just now referred were placed before Bachawat J. for his Lordship's consideration. In any event I am bound to follow the principles laid down by the Court of Appeal and I also respectfully agree with the same. If that is so, and if I come to the conclusion that the action of the Income Tax Authorities was not within the four corners of the powers committed to it under section 46(5A) of the Indian Income Tax Act, then the said order should be set aside. Apart from this, in my opinion Art. 226 of the Constitution is an overriding article and is not fettered by any provisions of law and in this respect I accept the contention of Dr. Pal. Article 226 of the Constitution lays down:

"Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government within those territories directions, orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition. Quo warranto, Certiorari, or any of them for the enforcement of any of the rights conferred by part III and for any other purpose."

Now looking at the articles itself one does not find any fetter to the same. It is not made subject to any existing laws or

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

Civil.
 1950.
 Elbridge Watson
 v.
 R. K. Das.
 Das Gupta, J.

to any restrictions imposed by the law. A reference to some other provisions of the Indian Constitution makes this position more clear. Article 225 of the Constitution lays down:

"Subject to the provisions of this Constitution and to the provision of any law of the appropriate legislature made by virtue of powers conferred on that legislature by this Constitution, the jurisdiction of and the law administered, in any existing High Court, and the respective powers of the Judges thereof in relation to the administration of justice in the court, including any power to make rules of Court and to regulate the sittings of the Court and of members thereof sitting alone or in Division Courts, shall be the same as immediately before the commencement of this Constitution."

There is a proviso to this article which is not necessary to be considered.

Thus under section 225 of the Indian Constitution the High Court and the Judges thereof should administer the law which the appropriate legislature could promulgate but that must be subject to the provisions of the Constitution itself.

Again under Article 372 of the Constitution the existing laws are to be continued in the territory of India which were in existence immediately before the commencement of this Constitution until altered, repealed or amended but this is to be subject to the other provisions of the Constitution. Thus both in the matter of the existing laws and in the matter of future laws which are to be promulgated by the legislature empowered by the Constitution, such laws are to be subject to the provisions of the Constitution. Therefore such laws must be subject to article 226 of the Indian Constitution. The article 226 is unfettered and the powers conferred by articles 226 are not subject to any restrictions imposed by any existing law or to be imposed by any future enactment.

In view of this, I have come to the conclusion that the powers conferred by section 226 of the Indian Constitution are not subject to the restrictions imposed by the provisions of section 67 of the Income Tax Act; the same cannot override or control the provisions of section 226 of the Indian Constitution.

Mr. Meyer then contended before me that section 226 cannot have any retrospective effect. In other words section 226 can be applied only to such acts of the executive which had been committed after the passing of the Indian Constitution. In support of this proposition he relied on a decision of this Court in *Rishindra Nath Sarkar v. Sakti Bhusan Ray*, (1) in which Mr. Justice Sen sitting with Mr. Justice Chunder came to the conclusion that assuming that the High Court has been given powers of interference, by Article 227 of the Constitution of India, with final orders, that would not entitle it to interfere with an order which was passed at a time when such power of interference did not exist. In this case their Lordships were considering the effect of the provisions of article 227 and not provision of article 266 of the Indian Constitution. Their Lordships were not called upon to decide the point which is now before me or to consider the scope of article 226 of the Indian Constitution. The only question which their Lordships were considering was whether Article 227 of the Indian Constitution gives them the right to interfere in cases of decrees which have already been passed and under which rights have been vested. The principle on which their Lordships proceeded in deciding that case is that the rights which have already vested under decrees which have been passed, cannot be interfered with under Article 227 of the Indian Constitution and their Lordships relied on the decision of the Judicial Committee in *Delhi Cloth and General Mills Co. Ltd. v. Income Tax Commissioner, Delhi*, (2) and the principal laid down, namely, that while provisions of a statute dealing merely with matters of procedure may properly, unless that construction be textually inadmissible, have retrospective effect attributed to them provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intendment. I also respectfully agree with the view which was taken by their Lordships. Rights which have already accrued to the parties cannot be taken away unless clear provisions have been made to that effect, and Article 227 does not purport to take away that right. But these considerations, to my mind, do not arise in the case of Article 226 of the Indian Constitution and particularly to the present case. Under article 226 of the Indian Constitution powers have been given to the High Court to issue to any person in authority orders or directions for enforcement of fundamental rights and

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

(1) [1950] A.I.R. Calc. 512. (2) (1927) I.R. 54 I.A. 421.

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

there is no question of taking away rights which have already vested.

Dr. Pal also contended before me that 'the High Court' can exercise powers conferred upon it by article 226 of the Indian Constitution, and it is 'the High Court' sitting after 26th January 1950 which will have those powers. Dr. Pal contends that the only condition to the use of that power is that it must be exercised by a High Court as constituted by the Constitution and sitting after 26th January 1950 and if that condition is fulfilled, there is nothing to fetter the powers which are conferred upon the High Court under section 226 of the Indian Constitution. I cannot accept the contention of Mr. Meyer on this point.

The only other point which remains to be considered and urged by Mr. Meyer is that there is adequate remedy provided by the Income Tax Act itself, which the petitioner could have availed himself of and if there is an adequate remedy provided by the Income Tax Act, then the High Court cannot interfere under section 226 of the Indian Constitution. Although I do not accept the extreme proposition which Mr. Meyer wants me to accept, namely, that under article 226 of the Indian Constitution the High Court has no power to interfere if there is a suitable enactment in the Statute itself, I am inclined to agree with him to this extent, namely, that if there is an adequate legal remedy provided in the Statute itself, then High Court should not interfere under Article 226 of the Indian Constitution. Mr. Meyer for this purpose relied on section 33A of the Indian Income Tax Act which runs as follows:

" 33A. Power of revision by Commissioner.

- (1) The Commissioner may of his own motion call for the record of any proceeding under this Act in which the order has been passed by any authority subordinate to him and may make such enquiry or cause such enquiry to be made and subject to the provisions of this Act, may pass such order thereon not being an order prejudicial to the assessee, as he thinks fit:

Provided that the Commissioner shall not revise any order under this sub-section if—

(a) where an appeal against the order lies to the Appellate Assistant Commissioner or to the Appellate Tribunal, the time within which such appeal may be made has not expired, or

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

(b) the order is pending on an appeal before the Appellate Assistant Commissioner or has been made the subject of an equal Appellate Tribunal or

(c) the order has been made more than one year previously.

(2) which is important for the present purpose runs as follows:

"The Commissioner may, on application by an assessee for revision of an order under this Act, passed by any authority subordinate to the Commissioner, made within one year from the date of the order, call for the record of the proceeding in which such order was passed and on receipt of the record may make such enquiry or cause such enquiry to be made, and subject to the provisions of this Act, may pass such order thereon, not being an order prejudicial to the assessee, as he thinks fit."

Then there is a proviso which is in the same terms as the proviso to sub-section (1). The question for my decision is whether the remedy provided by Section 33A is an adequate legal remedy and whether on the facts and circumstances of this case the petitioner could have availed himself of the same. The remedy in question must be a specific remedy at law which is not less convenient, beneficial and effective. (Halsbury Laws of England, Hailsham Edition, Vol. 9 Art. 1309) In my opinion the remedy provided by Section 33A is not such a remedy which should disentitle me, if I am otherwise satisfied about this matter, from giving relief on this application. Section 33A merely gives a discretion to the Commissioner, which he may or may not exercise to call for the records and intervene in the matter. The petitioner cannot ask for such intervention as a matter of right. Besides, I am doubtful whether in the facts and circumstances of this case the petitioner could have even availed himself of the said

CIVIL.

1950.

Elbridge Watson

v.

R. K. Das.

Das Gupta, J.

remedy. It appears that the attachment in question was made on the 18th March 1949 and at that time it was a perfectly valid attachment order. The order for instalment was made on the 25th May 1950, that is, more than one year after the attachment was effected. It was because of the order which was passed on the 25th May 1950 that the position was altered and the order for attachment which was made on the 18th March 1949 has to be withdrawn or revised. If then, it is a question of revising the order dated 18th March 1949 which is to be asked for the same cannot be done because the fact that the said order was made more than one year ago. The delay in obtaining the order for instalment does not seem to be due to any default on the part of the petitioner because his original application was kept pending and in the opinion of the Certificate Officer, at the instance of the Income Tax Officer. In any event I am not satisfied that the remedy provided by section 33A is such an effective specific remedy at law which should disentitle me from making an order on this application.

I am, therefore, of the opinion that it was incumbent on the Income Tax Officer either to withdraw the attachment effected on the 18th March 1949 or at least to revise the same so as to make it consistent with the order for instalments which has been made by the Certificate Officer, 24 Parganas. I am of the opinion therefore, that the applicant is entitled to a relief on this application and the direction which I give is that the Income Tax Officer do revise the order which has been made on the 18th March 1949 and make it consistent with the order for instalments which have been granted by the Certificate Officer, 24 Parganas on the 25th May, 1950.

The petitioner is entitled to the costs of this application.

Certified for two counsel.

Messrs. S. C. Ghose & Co.: Solicitors for the Petitioner.

Mr. N. C. Mitra: Solicitor for the Respondent.

S.K.R.C.

Application granted.

SUPREME COURT.

Present: *Mr. Justice Saiyid Fazl Ali, Mr. Justice M. Patanjali Sastri and Mr. Justice Meer Chand Mahajan.*

A. M. MAIR & CO.

v.

GORDHANDAS SAGARMULL.

CIVIL.

1950.

November, 30.

Arbitration—Setting aside an award—Dispute whether one is a party to the contract—Jurisdiction of the Arbitrator—Dispute under the contract—Construction of the contract whether a matter for the Court or for the Arbitrator?

The principal dispute raised in this case was whether the extension of time of delivery was granted within the time limited in the contract and whether the appellants were party to the contract in their own right as principal or entered into the contract only on behalf of the Bengal Jute Mill Company. But the latter question was not raised until the matter went to Arbitrators. The application was dismissed by Sinha J. but on appeal a Bench of the High Court consisting of C. J. and Chakravarti J. allowed the appeal and set aside the award on the ground that the appellant's own contention was that they had entered into the contract as brokers and were entitled to enforce its terms by reasons, usages or customs of the trade and it was not open to Sinha J. to treat them as principal and the award was liable to be set aside on the ground that the arbitration Tribunal has no jurisdiction to make award at the instance of a person who was not a party to the contract. Hence this appeal.

Held—(i) That both the disputes raised by the respondent fall within the scope of the Arbitration Clause and there is an end of the matter, for the Arbitrators would have jurisdiction to adjudicate on the disputes and the Court is not concerned with any error of law or fact committed by them or any omission on their part to consider any one of the matters.

(ii) The Court would not determine the true construction of the contract and find out whether the respondent's contention is correct or not. Once the dispute is found to be within the scope of the Arbitration Cause, it is no part of the province of the Court to enter into merits of the disputes.

Supreme Court Civil Appeal No. 42 of 1950 against the decision of *Harries, C.J. and Chakravarti, J.* in Appeal from Original Order No. 78 of 1948.

CIVIL.

1950.

A. M. Mair & Co.

v.

Gordhandas
Sagarmull.

Appeal by Messrs. A. M. Mair & Co. against the order of the Appeal Court setting aside an award given by the Arbitration Tribunal of the Bengal Chamber of Commerce.

The material facts will appear from the judgment.

Mr. N. C. Chatterjee, (Mr. B. Sen, Advocate, with him)
instructed by *Mr. P. K. Chatterjee*, Agent for the Appellants.

Mr. A. N. Grover, instructed by *R. N. Sachthey, Agent*, for
Mr. M. G. Poddar, Agent, for the Respondent.

The judgments of the Court were as follows:—

November, 30.

Fazi Ali J. :—This is an appeal from a judgment of a Bench of the High Court of Judicature at Calcutta in West Bengal reversing the decision of a single Judge of that Court, who had refused to set aside an award given by the arbitration tribunal of the Bengal Chamber of Commerce on a submission made by the respondents. The facts of the case are as follows:—

On the 25th January 1946, the appellants entered into a contract with the respondents for the sale of 5,000 maunds of jute, which was evidenced by a "sold note" (Exhibit A) which is in the form of a letter addressed to the respondents, commencing with these words: "We have this day sold by your order and for your account to the undersigned, etc." The word "undersigned" admittedly refers to the appellants, and at the end of the contract, below their signature, the word "brokers" is written. On the same day, a "bought note" (Exhibit B) was addressed by the appellants to the Bengal Jute Mill Company, with the following statement: "We have this day bought by your order and for your account from the undersigned, etc." In this note also, the word "undersigned" refers to the appellants, and underneath their signature, the word "brokers" appears, as in the "sold note." There are various provisions in the sold note, relating to the delivery of jute, non-delivery of documents, non-acceptance of documents, claims, etc., but the most material provisions are to be found in paragraphs 10 and 11. Paragraph 10 provided that the sellers may in certain cases be granted an extension of time for delivering the jute for a period not exceeding thirty days from the due date free of all penalties, and if the contract is not implemented within the extended

period, the buyers would be entitled to several options, one of them being to cancel the contract and charge the sellers the difference between the contract rate and the market rate on the day on which the option is declared. In the same paragraph, A. M. Mair & Co. there is another provision to the following effect:—

CIVIL.

1950.

A. M. Mair & Co.

v.

Gordhandas

Sagarmull.

Fazl Ali, J.

"Sellers shall notify buyers that goods will or will not be shipped within such extended period referred to in (a) and in the case of sellers intimating that they will be unable to ship within the extended time the Buyers shall exercise their option within 5 working days of receiving notice and notify Sellers. In the absence of any such notice from Sellers it shall be deemed that the goods have not been shipped and Buyers shall exercise their option within 5 working days after expiration of extended date and notify Sellers."

The 11th paragraph provides among other things that "all matters, questions, disputes, differences, and/or claims arising out of and/or concerning and/or in connection and/or in consequence of or relating to this Contract whether or not obligations of either or both parties under this contract be subsisting at the time of such disputes and whether or not this contract has been terminated or purported to be terminated or completed shall be referred to the arbitration of the Bengal Chamber of Commerce under the rules of its Tribunal of Arbitration for the time being in force and according to such rules the arbitration shall be conducted."

It is common ground that the respondents delivered 2,256 maunds of jute under the contract, but the balance of 2,744 maunds could not be delivered within the stipulated period, and, by mutual agreement, time was extended upto the 30th June 1946. On the 2nd July, 1946, the respondents addressed a letter to the appellants stating that the balance of jute could not be despatched owing to lack of wagons, and, "extension" was requested for a period of one month. In reply to these letters, which was received by the appellants on or about the 3rd July 1946, time was extended till 31st July 1946. On the same day on which the reply was received by the respondents, i.e., on the 9th July, 1946, they addressed a letter to the appellants pointing out that the extension of time had not been

CIVIL.
1950.

A. M. Mair & Co.

v.

Gordhandas
Sagarmull.

Fazl Ali, J.

intimated within the 5th working day as provided in the contract and therefore the contract was automatically cancelled. After this letter, some further correspondence followed between the two parties and finally a bill of difference amounting to Rs. 4,116 was submitted by the appellants to the respondents, who, in their turn, denied their liability to pay the sum. The appellants thereupon claimed arbitration under clause 11 of the sold note and submitted the dispute between them and the respondents to the Bengal Chamber of Commerce. On the 6th February, 1947, the Tribunal of Arbitration made an award to the effect that the due date of contract had been extended by mutual agreement upto the 31st July 1940, and accordingly the respondents should pay to the appellants a sum of Rs. 4,116/- together with interest at the rate of 4% per annum from the 10th of August 1946, until the date of the award. A sum of Rs. 210/- was also held to be payable by the respondents on account of costs. Nearly a year later, on the 19th February, 1949, a petition was presented by the respondents under the Indian Arbitration Act, 1940, to the High Court at Calcutta, in its Ordinary Original Civil Jurisdiction, praying *inter alia* that the award may be adjudged to be without jurisdiction and void and not binding on the respondents and that it may be set aside. The main point raised by the respondents in the petition was that it was not open to the appellants to invoke the arbitration clause, as the Bengal Jute Mill Company and not the appellants were the real party to the contract and the appellants had acted as mere brokers. The appellants asserted in reply that the allegation made by the respondents in regard to there being no privity between them and the appellants was wrong, and in paragraph 16 of their affidavit they stated as follows:—

“With regard to paragraph 7 of the petition I crave reference to the said contract for its true construction and effect. I say as I have already stated that according to the custom or usage or practice of the trade the respondent is entitled to charge brokerage and also to enforce the terms of the said contract.”

The case was heard by Sinha J., who dismissed the petition on the ground that the contract was directly between the respondents and the appellants. The learned Judge also observed that if the right of the appellants to enforce the contract de-

pending upon the existence of custom it would have been necessary to take evidence and the arbitrators would have had jurisdiction to decide the question of the existence of custom.

CIVIL.

1950.

A. M. Mair & Co.

v.

Gordhandas
Sagarmull.

Faiz Ali, J.

The respondents being dissatisfied with the judgment of Sinha J., preferred an appeal, which was heard and disposed by a Division Bench of the High Court consisting of the learned Chief Justice and Chakravarti J. The learned Judges held that having regard to the fact that the appellants' own contention was that they had entered into the contract as brokers and were entitled to enforce its terms by reason of the usage or custom of the trade, it was not open to Sinha J. to treat them as principals, and the award was liable to be set aside on the ground that the arbitration tribunal had no jurisdiction to make an award at the instance of a person who was not a principal party to the contract. The appellants thereafter having obtained a certificate from the High Court under Section 109(c) of the Code of Civil Procedure, preferred this appeal.

It seems to us that this appeal can be disposed of on a short ground. We have carefully read the affidavit filed on behalf of the appellants in the trial Court, and we are unable to hold that their case was that they were not parties to the contract or what they had asked the Court to proceed on the sole ground that they were entitled to enforce the contract by virtue of the custom or usage of the trade. In our opinion, the position which was taken up by them may be summed up as follows:—

- (1) They did not accept the allegations made by the respondents that they were not parties to any arbitration agreement with the respondents.
- (2) They asked the Court to construe the contract and its effect and asserted that they were entitled to enforce it.
- (3) They also stated that they were entitled to enforce the contract according to the custom or usage of the trade.

The principal dispute raised in this case was whether the extension of the time for delivery was granted within the time

CIVIL

1950¹

A. M. Mair & Co.

v.

Gordhandas
Sagarmull?

Fazl Ali, J.

limited in the contract. That dispute is certainly covered by the arbitration clause. The further dispute that the brokers (appellants) were not parties to the contract in their own right as principals but entered into the contract only on behalf of the Bengal Jute Mill Company does not appear to have been raised until the matter went to the arbitrators. Assuming that at that stage it was open to the respondents to raise such an objection, after the other dispute which clearly fell within the arbitration clause was referred to the arbitrators, this further dispute is also one which turns upon the true interpretation of the contract, so that the respondents must have recourse to the contract to establish their claim that the appellants were not bound as principals while the latter say that they were. If that is the position, such a dispute, the determination of which turns on the true construction of the contract, would also seem to be a dispute, under or arising out of or concerning the contract. In a passage quoted in *Heyman v. Darwins Ltd.* (1), Lord Dunedin propounds the test thus:—

"If a party has to have recourse to the contract, that dispute is a dispute under the contract." Here, the respondents must have recourse to the contract to establish their case and therefore it is a dispute falling within the arbitration clause. The error into which the learned Judges of the Appellate Bench of the High Court appear to have fallen was their regarding the dispute raised by the respondent in respect of the position of the appellants under the contract as having the same consequence as a dispute as to the contract ever having been entered into.

If, therefore, we come to the conclusion that both the disputes raised by the respondents fall within the scope of the arbitration clause, then there is an end of the matter, for the arbitrators would have jurisdiction to adjudicate on the disputes, and we are not concerned with any error of law or fact committed by them or any omission on their part to consider any of the matters. In this view, it would not be for us to determine the true construction of the contract and find out whether the respondents' contention is correct or not. Once the dispute is found to be within the scope of the arbitration clause, it is no part of the province of the Court to enter into the merits of the dispute.

(1) [1942] A.C. 356

In the result, we allow this appeal, set aside the judgment of the Appellate Bench of the High Court and restore the order of Sinha J. The appellants will be entitled to their costs throughout.

Patanjali Sastri, J.:—I agree.

Mahajan J.:—I agree with my brother Fazl Ali that this appeal be allowed with costs.

S.K.R.C.

Appeal allowed.

CIVIL.

1950

A. M. Mair & Co.

v.

Gordhandas
Sagarmull.

Fazl Ali, J.

ORIGINAL CIVIL.

Before Mr. Justice P. B. Mukharji.

CIVIL.

INDRA KUMAR KARNANI

1950.

v.

January, 17.

C. C. GANGULY AND ANOTHER.*

Writ of Prohibition or Certiorari—Construction of the words "decide the appeal", in Section 32(4) of the Rent Control Act, 1948—Powers of the Chief Judge under Section 32 of the Rent Act, 1948.

A writ of Prohibition or a writ of Certiorari is competent against the Chief Judge acting as an Appellate Authority under the Rent Control Act of 1948 and following the Rule 9 of the Rent Control Rules.

The proper construction of the words "decide the appeal" in Section 32(4) of the Rent Control Act, 1948, must mean the particular appeal of the applicant before the Chief Judge and not the entire *lis* or the controversy between the parties. The words "decide the appeal" gave therefore the power to the Chief Judge either to dismiss the appeal in toto or granting the appeal in toto or allow the appeal within the limits of the appellant's claim.

The powers of the Chief Judge under Section 32(4) of the Rent Control Act of "perusing record", of "taking such evidence as himself" and of "personally making such further enquiry as he thinks fit" are powers in aid of this object. They are not powers which gives the Chief Judge the jurisdiction to come to a finding which is not within the ambit of the appellant's contention.

Any construction of statute which helps a party to evade or circumvent it must be discouraged.

An appeal is always a creature of statute and the Appellate authority has only such powers and jurisdiction as the statute gives it. Neither the Rent Control Act nor the Rule made thereunder invest the Chief Judge with the same jurisdiction as that of ordinary Court of Appeal under Order 41 Rule 33 of the C. P. C.

These statutory Tribunals must conform strictly to the powers and jurisdictions conferred by the Special Statute and special Rules thereunder and should not import the notions of ordinary Courts of Law and the doctrine of inherent jurisdiction of ordinary Courts of Law.

* In the matter of a Writ of Prohibition and a Writ of Certiorari.

Application for the issue of a writ of Prohibition or Certiorari under Clause 4 read with Clause 21 of the Charter of 1774 of this Court by Indra Kumar Karnani.

CIVIL.

1950.

Indra Kumar
Karnani

v.

C. C. Ganguly.

The material facts will appear from the judgment.

Mr. E. R. Meyer for the Applicant.

Mr. A. C. Sarkar, Jr. Standing Counsel for the Respondent.

The judgment of the Court was as follows:—

P. B. Mukharji, J.:—This is an application for the issue of a Writ of Prohibition or Certiorari under clause 4 read with clause 21 of the Charter of 1774 of this Court. The applicant is Indra Kumar Karnani and the respondents are the Chief Judge of the Small Causes Court, Calcutta and the Commissioner of Police, Calcutta.

January, 17.

The applicant is the Receiver appointed in Suit No. 1896 of 1932 and is in possession of premises No. 13, Lower Chitpur Road, Calcutta, which is a five-storied building. Respondent Commissioner of Police is a tenant under the applicant in respect of the said premises except the ground floor and the rent agreed before the commencement of tenancy was Rs. 5,500/- per month. The Respondent Commissioner of Police made an application to the Rent Controller for fixing the standard rent and asked for such standard rent to be fixed at Rs. 3,500/- per month. The Rent Controller on the 4th March 1949 fixed the standard rent at Rs. 4,200/- per month. The applicant preferred an appeal from the order of the Rent Controller asking the standard rent to be fixed at Rs. 5,500/- per month. The respondent Commissioner of Police also preferred an appeal against the order of the Rent Controller but this time contending that the standard rent instead of Rs. 3,500/- per month which was in his previous application before the Rent Controller be fixed at the rate of Rs. 3,547/- per month. The appeals were, before the respondent the Chief Judge of the Court of Small Causes, Calcutta, under section 32 of the Rent Control Act, 1948.

According to the affidavit of the Chief Judge of the Court of Small Causes, the tenant's appeal was rejected by him on the

CIVIL.

1950.

Indra Kumar
Karnani

v.

C. C. Ganguly.

P. B. Mukharji, J.

ground that the tenant Commissioner of Police failed to comply with the second proviso of section 32(1) of the West Bengal Premises Rent Control Act, 1948 because the arrears of rent payable by the tenant in accordance with the order of the Rent Controller appealed against had not been paid or deposited in accordance with the proviso of the statute. But the Chief Judge 'dismissed the appeal' of the landlord and modified the decision of the Rent Controller by fixing the standard rent at Rs. 3,545-11-4 per month to take effect from the month of December, 1948. This order of the Chief Judge was dated the 27th July, 1949, and has been challenged before me in this application as being without jurisdiction in excess of the powers conferred upon him by the West Bengal Premises Rent Control Act.

The point raised is one of the considerable importance. It is concerned mainly with the interpretation of section 32(1) of the West Bengal Premises Rent Control Act, 1948 and in particular with the construction of the words 'decide the appeal' occurring therein.

Mr. Meyer learned counsel for the applicant has argued that the Chief Judge of the Court of Small Causes having dismissed or rejected the tenant's appeal on the ground of non-compliance of the second proviso of section 32(1) of the Act has nonetheless granted the tenant not only the full relief but also more than the relief that the tenant himself claimed. The point of his argument is that the tenant himself before the Rent Controller asked the standard rent to be fixed at Rs. 3,500/- per month and in his appeal he asked this standard rent to be fixed at Rs. 3,547/- per month. But Mr. Meyer describes that by inexplicable magnanimity, the Chief Judge fixed the standard rent at Rs. 3,545-11-4 per month although the tenant in his appeal asked the rent to be fixed at Rs. 3,547/- per month. That is Mr. Meyer's first criticism of the Chief Judge's order.

Secondly Mr. Meyer has argued that the only appeal before the Chief Judge was the landlord's appeal seeking the fixation of the standard rent at Rs. 5,500/- per month and not at Rs. 4,200/- per month as determined by the Rent Controller. According to the learned counsel for the applicant the subject matter of the appeal before the Chief Judge was confined to the question

whether the standard rent should be fixed at a figure between Rs. 4,200/- per month and Rs. 5,500/- per month and the Chief Judge acted beyond his jurisdiction by fixing it at Rs. 3,545-11-4, which was nobody's case before the Chief Judge.

CIVIL.

1950.

Indra Kumar
Karnani

v.

C. C. Ganguly.

P. B. Mukharji, J.

The learned counsel for the applicant has developed this branch of his argument by reference to the different provisions made in the statute itself as well as the Rules made thereunder. On the question of construction of the words 'decide the appeal' his submission is that 'the appeal' circumscribes the limit between Rs. 4,200/- and Rs. 5,500/- within which the Chief Judge has to act and there is no other appeal before him. He has also argued that the opening words of section 32 show that the appeal is given to the person 'aggrieved' by the order of the Controller and, therefore the Appellate Authority should try to redress that grievance, and if that is not possible he should dismiss the appeal but in no circumstances he can accentuate the grievance of the applicant in the manner he has done. Mr. Meyer has taken me through the Rules made under the West Bengal Premises Rent Control Act. The point of his submission on the rules is that the Code of Civil Procedure in its entirety has not been extended to the proceedings before the Rent Controller or the Appellate Authority. Rule 8, he submits gives powers to the Rent Controller to use the relevant provisions of the Code of Civil Procedure with necessary modification only for the purpose of summoning and enforcing the attendance of witnesses and compelling the production of documents in enquiry. Rule 9 provides that in making enquiries under the Act the Controller or the Chief Judge should follow as nearly as possible the procedure laid down in the Code of Civil Procedure for the regular trial of suits the substance only of the evidence being recorded as in unappealable cases. Rule 10 only extends Order 47 of the Code of Civil Procedure in respect of review only. Therefore Mr. Meyer's argument is that the provision of Order 41 Rule 44 of the Code of Civil Procedure is not extended to the proceedings before the Chief Judge. Whereas under Order 41 Rule 33 of the Code of Civil Procedure the Appellate Court has the power to pass any decree and make any order which ought to have been passed or made. Such a power is not given to the Chief Judge of the Small Causes Court under the West Bengal Premises Rent Control Act. Mr. Meyer argued that this power has been deliberately withheld from the Chief Judge particularly in view

CIVIL.

1950.

Indra Kumar
Karnani

v.

C. C. Ganguly.

P. B. Mukharji, J.

of the fact that Order 47 of the Code of Civil Procedure relating to review has been extended and therefore Order 41 of the Code of Civil Procedure relating to appeals is by necessary implication excluded.

Those in brief are the submissions and arguments of the learned counsel for the appellant.

The learned Junior Standing Counsel appearing for the respondent argues that on the true construction of the words 'decide the appeal' the expression should mean that the entire controversy between the landlord and the tenant no matter whether it is the landlord's appeal or the tenant's appeal has to be decided and the words 'the appeal' should not be given the narrow construction contended for by the applicant. According to him whether it is the landlord's appeal or the tenant's appeal it does not matter so long as an appeal is made before the Chief Judge and when such appeal is made the entire *lis* is open for decision. He has further enforced his argument by reference to the subsequent words that follow in section 32(4) of the Act namely: "and shall not send it back on remand." Those words according to him mean that the Chief Judge has to decide the appeal and if he is not satisfied with the material already on the record he is given by the statute the power even of taking 'evidence himself' or 'personally making such further enquiries as he thinks fit.' Therefore he has not only the power either to allow the appeal in toto or dismiss the appeal in toto or decide the appeal within the limits of the contention of the appellant only but for his satisfaction he can take evidence himself and make such personal enquiries as he thinks fit and come to any decision that he thinks fit and that is the reason why the power of sending the case back on remand to the Rent Controller is taken away. Under the Calcutta House Rent Control Order, 1943, section 14(IA) (2) there was no reference to any right to remand in the Chief Judge. Similarly under section 25(3) of the Calcutta House Rent Control Ordinance, 1946, the Chief Judge was given power to decide the appeal but there also was no reference to right of remand in the Chief Judge. From the specific reference to the words that the Chief Judge shall not send the case back on remand it is argued on behalf of the Government that the Chief Judge has responsibility to determine the standard rent irrespective of the contentions as to who is

the appellant so long as there is an appeal before him from the order of the Rent Controller.

CIVIL.

1950.

Indra Kumar
Karnani

v.

C. C. Ganguly.

P. B. Mukharji, J.

An appeal is always a creature of statute and the appellate authority has only such powers and jurisdiction as the statute gives it. The fact that here the Chief Judge cannot send the case back on remand under the statute does not in my opinion clothe the Chief Judge with the same jurisdiction as is provided in O. 41 r. 33 of the Code of Civil Procedure. It is clear from the statute and the rules made thereunder that the provisions of the Code of Civil Procedure relating to appeals have not been extended to the Rent Controller or the Chief Judge. The procedure about review under Order 47 of the Code has however been extended to proceedings before the Chief Judge. Where the rules make specific references to specific rules of the Code of Civil Procedure being extended to these proceedings it must in my opinion be held that the provisions of O. 41 r. 33 are excluded. *Expressio facit cessare tacitum*. The next argument made on behalf of the Government is that even apart from O. 41 r. 33 the Appellate Court has inherent jurisdiction to make such order or decree as is contemplated in O. 41 r. 33. In my judgment the doctrine of inherent jurisdiction of courts does not apply to these special Tribunals or Appellate Authority created by special statute and functioning under special rules made thereunder. It has been held by a Division Bench of this Court in *Kiron Chandra v. Kali Das* (1), that an Appellate Authority under the Bengal House Rent Control Order, 1942, did not act as a Court but as a superior Executive Officer. In that case the Court considered paragraph 12 of the House Rent Control Order which used comparable language. The same view was also taken by another Division Bench of this Court in *Sm. Suhashini v. Mahendra Kumar* (2), dealing with similar provisions in section 25 of the Calcutta House Rent Control Order, 1943. Both these cases decided that because the Appellate Authorities were not Court therefore revision under section 115 of the Code of Civil Procedure did not lie. I respectfully follow these decisions. If the Appellate Authority is not the Court then both the arguments on behalf of the Government to call in aid O. 41 r. 33 of the Code and to invoke inherent jurisdiction of the court become ineffective. I am, therefore, not disposed to invest the Chief

(1) (1943) 47 C.W.N. 460.

(2) (1947) 51 C.W.N. 818.

CIVIL.

1950.

Indra Kumar

Karnani

v.

C. C. Ganguly.

Judge of the Small Causes Court acting as an Appellate Authority from the Rent Controller under the Special Statute, Rent Control Act, 1948, with the powers and jurisdiction of a regular Court of Appeal under the Code of Civil Procedure when the statute and the rules do not say so.

The construction of the words 'decide the appeal' in section 32(4) of the Rent Control Act, 1948, in this context must mean the particular appeal that is before the Chief Judge and not the entire *lis* or the controversy. Section 32(1) provides that the aggrieved person may present an appeal in writing to the Chief Judge. It is that appeal which is meant by the words 'the appeal' under section 32(4). The words "decide the appeal" give therefore the power to the Chief Judge either to dismiss the appeal or to allow the appeal within the limits of the appellant's claim, which is the only subject matter of appeal before him. His powers under section 32(4) of the Rent Act of 'perusing record' and of 'taking such evidence himself' or 'personally making such further enquiry as he thinks fit' are powers in aid of this object. They are not powers in my opinion which give the Chief Judge the jurisdiction to come to a finding which is not within the ambit of the appellant's contention. Any other construction will leave the room open for evasion or circumvention of the statute. As for instance what happened in this case. Though the tenant's appeal in this case could not be entertained by reason of the failure of the tenant to pay or deposit arrears of rent in accordance with the second proviso of section 32(1) (b) of the Rent Act, yet by reason of the construction contended for by the Government the tenant has in fact succeeded in having his full remedy. Any construction of the statute which helps a party to evade or circumvent it must be discouraged. This principle further enforces the argument that the words 'the appeal' in section 32(4) of the Act must mean the particular appeal of the Appellant and not the entire *lis* or controversy between the parties.

These Statutory Tribunals must conform strictly to the powers and jurisdiction conferred by the Special Statutes and special rules thereunder and should not import the notions of ordinary courts of law, and the doctrine of inherent jurisdiction of ordinary courts of law. If any authority is needed reference

may be made to *Mahant Bhagavathi v. M. Sarangaraja Iyengar*, (1) following 39 I.A. 197 and 3 Q.B.D. 1.

CIVIL.

1950

Indra Kumar
Karnani

V.

C. C. Ganguly.

—
B. Mukharji, J.
—

The result therefore, is that the order of the Chief Judge of the Small Causes Court is beyond jurisdiction and should be quashed, and set aside in accordance with prayer (b) of the petition and there will also be an order prohibiting him from giving effect to his order passed in Rent Appeal Case No. 3778 P. of 1949 dated the 27th July 1949 in accordance with prayer (a) of the petition. The effect of quashing and setting aside the order of the Chief Judges is that the order of the Rent Controller dated the 4th March, 1949, fixing the standard rent at Rs. 4,200/- per month remains the effective standard rent.

One question remains although not pressed by the learned Junior Standing Counsel. The two decisions of the Division Bench of this Court, 47 C.W.N. 460 and 51 C.W.N. 818 although describe the appellate authority as a persona designata or a superior Executive Officer and the appellate authority therefore is not a court strictly within the meaning of section 115 of the Code of Civil Procedure so as to permit a revision thereunder by this Court. Such appellate authority is in the nature of an inferior Tribunal whose functions though not strictly judicial are quasi-judicial. I am of the opinion that a writ of prohibition or a writ of certiorari in a proper case such as the one I have before me is the correct remedy. It has been held by the learned Chief Justice of the Madras High Court in *Dr. C. S. Krishnaswamy Ayyar v. Mohanlal Binjani*, (2) that though the correctness of findings of fact cannot be questioned in the application for the issue of a writ of certiorari yet if the Chief Judge of the Court of Small Causes commits an error of law or error of jurisdiction a writ of certiorari lies to the High Court to quash his order. Sir Leonard Stone, C.J., and Chagla, J. of the Bombay High Court also came to the same conclusion in *Mrs. Khurshed Feroze Mode v. The Rent Controller of Bombay*, (3) under the Bombay Rent Act that a writ of certiorari was a competent remedy. As pointed out in Hailsham Edition of Halsbury's Laws of England Vol. 9 Page 833 Art. 1411 that although prohibition does not lie against a body which is not and does not claim to

(1) (1931) I.L.R. 54 Mad. 722.

(2) [1949] I.L.R. Mad. 657.

(3) [1946] I.L.R. Bom. 940.

CIVIL.

1950.

India Kumar

Karnani

v.

C. C. Ganguly.

P. B. Mukharji, J.

be a Court or Judicial Tribunal in any legal sense the High Court will issue the writ to a body exercising Judicial functions though the body cannot be described as being in any ordinary sense a court. To the same effect is the observation relating to the writ of certiorari in the same volume of Halsbury's Laws of England page 855 Art. 1449 where it is said that certiorari lies only in respect of judicial as distinguished from administrative acts and wherever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially act in excess of their legal authority they are subject to the controlling jurisdiction of the K. B. Division exercised in the writ of certiorari. Here the learned Chief Judge of the Court of Small Causes was acting in my view quasi judicially inasmuch as he heard both the parties, recorded their evidence and heard their respective arguments and gave his order in the form of a judgment and that is a procedure and act which are certainly quasi judicial. Under rule 9 made under the Rent Control Act the Chief Judge while making an enquiry under section 32(4) of the Act is required to follow the procedure as nearly as may be as laid down by the Civil Procedure Code for regular trial of suits. I, therefore, consider the acts quasi judicially in this respect. It is not necessary here for me to determine what happens in a case under section 32(4) of the Rent Control Act where the Chief Judge comes to a decision without hearing the parties and acts purely as an Executive Officer and whether in such a case mandamus or order under section 45 of the Specific Relief Act is the more appropriate remedy rather than prohibition or certiorari. That he can act without hearing parties seems to be a course suggested in the Division Bench case reported in 47 C.W.N. 460. I do not express any opinion on that question particularly in view of the fact that the learned counsel for the Government has not made any point about the maintainability of the application on this ground and having regard to the new rule 9 under the present Rent Act which make it obligatory for the Chief Judge to follow the procedure under Civil Procedure Code for trial of suit and hence to hear both the parties. I need only observe that in *R. v. Kingston*, (1) Lord Goddard, C.J. sitting with Humphreys and Finnemore, JJ. did grant the writ of certiorari against the Rent Tribunal and in fact granted costs against the Tribunal who appeared by counsel and contested the case. I, however, make no order as to costs

(1) [1949] 1 All. E. R. 260.

on this application.

There will be an order in terms of prayers (a) and (b) of the petition as I have indicated above and the Rule is accordingly made absolute only against Respondent Chief Judge of the Presidency Court of Small Causes who alone was directed to show cause.

Civil.

1950.

Indra Kumar
Karnani

C. C. Ganguly.

P. B. Mukharji, J.

Mr. T. Banerjee: Solicitor for the Applicant.

Messrs. N. C. Pal and N. C. Mitra: Solicitors for the Respondents.

S.K.R.C.

Rule made absolute.

SPECIAL BENCH.

*Before Sir Arthur Trevor Harries, Kt., Chief Justice
and Mr. Justice S. N. Banerjee.*

CIVIL.

1950.

May, 23.

SUDHINDRA NATH DATTA

v.

SAILENDRA NATH MITRA.*

Writ of mandamus—Order of Requisition of premises under section 3(1) of the West Bengal Requisition and Control (Temporary Provisions) Act, 1947, (Act V of 1947)—Opinion of the Provincial Government that a premises required for public purpose—An executive or administrative Act—Grounds on which the Court can hold that an Order of the Govt. is "malafide"—Art. 19(1) (f) and Art. 31 of the Constitution.

Held—(i) That requisition under section 3(1) of the West Bengal Premises Requisition and Control (Temporary Provisions) Act 1947, is clearly an executive or an administrative Act.

(ii) Before the Court can hold that said order of Government is malafide, facts must be established upon which the Court can hold affirmatively that the order was not honestly made or not made under any particular provision. It is not sufficient to place facts which raise merely a suspicion that the order might not have been made honestly.

(iii) It is quite clear that Art. 19(1) (f) of the Constitution has no application to cases where any authority or person has compulsorily acquired property or obtained possession of the property. What the Act does is to deprive a person of possession of the property and it cannot be said to be an enactment restricting his right to acquire, hold or dispose of the property as that phrase is used in Art. 19(1) (f).

(iv) The West Bengal Premises Requisition and Control Act 1947, is not *ultra vires* the Constitution.

Application for mandamus by Sudhindra Nath Datta directing the respondent to show cause why a mandatory order should not issue for cancellation of a certain order of requisition made by the Respondent as an Officer of Government.

* Case No. 35 of 1949 reported under Chapter V rule 3 of the Original Side Rules.

The material facts will appear from the judgment.

Messrs. H. Rahman and A. K. Sarkar for the Petitioner.

Mr. S. M. Bose, Advocate General with Mr. K. P. Khaitan for the Respondent.

Civil.
—
1950.
Sudhindra Nath
Datta
v.
Sailendra Nath
Mittra.
—

The judgments of the Court were as follows:—

May, 23.

Harries, C.J.:—This is an application for mandamus directing the respondent to show cause why a mandatory order should not issue for cancellation of a certain order of requisition made by the respondent as an officer of Government. There was an alternative prayer for a writ of prohibition prohibiting the respondent from giving effect to a pretended order of requisitioning.

That the petitioner is the owner of certain premises known as 13 Ballygunge Circular Road in the city of Calcutta.

On May 22, 1949, he was served with an order purporting to have been made by Government requisitioning the premises 13, Ballygunge Circular Road with the exception of the rooms a kitchen and certain offices. The notice requisitioning the property did not state the purpose for which the property was required, but it is the case for the petitioner that he went on to the premises at about 3.45 P.M. on May 22nd and he was informed by some officer of Government that the premises had been requisitioned as a residence for the Hon'ble Minister of Excise in the Government of the State of West Bengal. It is common ground that the Minister did take up residence in these premises and has resided at the premises ever since.

It is contended on behalf of the petitioner that the order of requisition in this case is not warranted by any provision of law. The order purports to have been made under section 3(1) of the West Bengal Premises Requisition and Control (Temporary Provisions) Act, 1947 (Act V. of 1947). That Sub-section is in these terms:—

“Whenever it appears to the Provincial Government that any premises in any locality are needed or are likely to be needed

CIVIL

1950.

Sudhindra Nath
DattaSailendra Nath
Mittra

Harries, C.J.

for any public purpose, it may, by order in writing requisition such premises:

Provided that no premises exclusively used for the purpose of religious worship shall be requisitioned under this Section."

The first argument addressed to us was that the requisitioning of premises as a residence for a Minister of the State of West Bengal cannot be regarded as a public purpose. I am very doubtful whether it is open to this Court to go into this question at all. In the case of *Wijeyesekara v. Festing*, (1) their Lordships of the Privy Council were called upon to construe precisely the same words as appear in the Sub-section which I have read. The words in the Privy Council case were "whenever it shall appear to the Government that land in any locality is likely to be needed for any public purpose, it shall be lawful for the Governor to direct etc." Their Lordships were of opinion that the decision of the Governor that the purpose was a public purpose for which premises were required was final and could not be questioned in any Court. If that case applies then the opinion of the Provincial Government that housing a Minister is a public purpose would be final and could not be questioned by this Court. However, even if this Court can question the matter it appears to me quite clear that housing a high Minister of State is clearly a public purpose. It is in the public interest that Ministers of the State of West Bengal should have suitable accommodation. How can they be expected to give up their best if they have to live in discomfort and squalor. It is suggested that the Minister concerned was a member of the Scheduled caste and had never been accustomed to live in premises of this kind. A Minister of State is entitled to accommodation consistent with his position and the dignity of his office and it appears to me that requisitioning part of a house in Ballygunge as a residence for a Minister is clearly a public purpose; therefore it cannot be said that the Act could not apply.

It was then suggested that requisitioning premises was a judicial act and before a requisitioning order could be made notice would have to be given to the petitioner and the latter had a right to be heard. It appears to me that requisitioning under this Act is clearly an executive or an administrative Act.

(1), [1949] A.C. 646.

It is true that the Bombay High Court in a recent case have taken the contrary view, but I am unable to follow that case. A Bench consisting of five Judges of this Court held that the Power of executive under the West Bengal Security Act to make an order for detention could not be questioned. In that case the words were "The Provincial Government if satisfied" that certain state of affairs existed. The Bench held that if the Government was honestly satisfied the Court could not go into the grounds of the satisfaction. It was never suggested by the Bench that Act of ordering the detention of a man was a judicial act which could not be made without a judicial enquiry. Within the last few days the Supreme Court have considered the right of the Madras Government to detain a person likely to act in a manner prejudicial to the maintenance of law and order. In that case the order was made under an Act which provided that an order of detention could be made if the Central or State Government was satisfied that certain circumstances existed. It is to be noted that the Supreme Court have never suggested that an order could not be made without some form of judicial enquiry.

Civil.
—
1950.
Sudhindra Nath
Datta
v.
Sailendra Nath
Mittra.
—
Harries, C.J.
—

It appears to me that it is quite impossible for this Court to follow the view of Bombay having regard to the decisions of this Court and the very recent decision of the Supreme Court. That being so, I do not think that it is necessary to say anything more upon this question.

It was then suggested that the order was mala fide and the facts upon which this contention is made are set out in the petition. It seems that these premises had been previously requisitioned for the residence of a former Excise Minister, a certain Dwarka Nath Barori. It is said that this Minister did not pay the rent of the premises and had to be sued in the Court at Alipore. Eventually he left for Pakistan and abandoned his occupation of the premises. It is said that he actually made over possession to another member of the Scheduled castes, Mr. Panchanan Das Choudhury who it is said sub-let the premises to various tenants. The suggestion is that Panchanan Das Choudhury somehow influenced Government to requisition these premises in 1949 for the then Excise Minister, though Barori had left the premises in 1947. It is said that the hand of Panchanan Das Chowdhury is seen in the fact that the Government did not requisition the whole of the premises occupied by Barori, but

CIVIL.

1950.

Sudhindra Nath
Datta

v.

Sailendra Nath
Mitra.

Harries, C J.

only the part not then occupied by some friend of Panchanan Das Chowdhury. The fact that that part was not requisitioned it is said suggests the complicity of Panchanan Das Chowdhury in the matter and we are asked to infer that the act of Government was malafide.

There is no evidence at all that Panchanan Das Chowdhury caused this order to be made and these faults, even if true can raise nothing more than a suspicion. We are urged to hold that the facts must be true because Government never called for information as to the nature of the premises which they could have done under r. 3(2). I imagine that the Government would not call for information if they had the information, and they may well have had the information relating to this premises in their possession because a Minister had actually occupied the premises previously.

It is suggested that the order itself shows signs that it could not be honest. The order as originally drafted required possession to be given on May 24 at 11-30 A.M. The date, 24th May, was crossed out and 22nd inserted, and the time 11-30 crossed out and 3-30 P.M. inserted. All I can infer from these alterations is that some urgency in the matter and it may well be that the Minister had no accommodation and that accommodation had to be found for him immediately. In any event, I cannot infer dishonesty or malafide from these corrections in the order. If these corrections could suggest dishonesty I should have imagined that if it was necessary to alter the date and time, a new order could have been drawn up; so that attention could not be drawn to the fact that the date and time had been altered.

There is no evidence at all before us for which we could infer that a residence was not required for the Minister. If material had been placed before us upon which we could hold that Minister was already comfortably housed, we might have inferred, although I do not say we could have inferred, that the order was not honest. There is however nothing to suggest that the Minister did not require this property immediately as a residence and therefore it is quite impossible for this Court to hold that the order was malafide.

Panchanan Das Choudhury who apparently does not wish well of the petitioner may have informed Government that these premises were available and his motives may not have been all that they should be. But that does not mean that the Government having received the information acted other than perfectly properly and honestly. It seems to me that it is quite impossible to say that this order was malafide, because obviously it was made to provide the Excise Minister with a residence. After the order was made the Excise Minister took up his residence in the premises and has remained there ever since. It seems to me quite clear that the facts show that the order must have been made honestly and that being so, it cannot be suggested that the order was malafide.

Very recently it was pointed out by the Supreme Court that orders of detention cannot be set aside though there exist strong ground for suspecting that the orders were not bonafide. Before a Court can hold that orders of Government are malafide acts it must be established upon which the Court can hold affirmatively that an order was not honestly made or not made under a particular provision. It is not sufficient to place facts which raise a suspicion that the order might not have been made honestly. In this case though the facts relating to Panchanan Das Choudhury show that he might have been concerned for his own purpose, in letting Government know that this property was available, nevertheless there is nothing to show that Government was influenced in any way against the petitioner and made this order dishonestly.

It was urged that we should be satisfied that the Government or the officer responsible had applied his mind to the matter and after doing so had made this order. We cannot possibly hold otherwise in having regard to the fact that the order was made to house a Minister and once it was made the Minister took possession and resided in the premises ever since. On the facts we are perfectly satisfied that the order cannot be challenged on the ground that it was made malafide or on the ground that it was not warranted by the provisions of the Act.

Lastly, it was contended that the Act under which the order was made, namely, Act V of 1947 is *ultra vires* the Constitution

CIVIL.

1950.

Sudhindra Nath

Datta

v.

Sailendra Nath

Mittra.

Harries, C.J.

CIVIL.

1950.

Sudhindra Nath

Datta

v.

Sailendra Nath

Mitra.

Harries, C.J.

of India. Reference is made to Article 19(1) (X) of the Constitution which provides:

"All citizens shall have the right (x) to acquire, hold and dispose of property."

Clause (5) of this Article provides:

"Nothing in sub-clauses (d), (e) and (f) of the said Clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe."

The argument is that the Act imposes such restrictions on the right to acquire, hold and dispose of property as cannot be described as reasonable in the interest of the general public or for the protection of the interests of any Scheduled Tribe.

In my judgment this Article has no application to cases where a State or any person is empowered to deprive another of his property. The relevant Article in my opinion is Article 31. Clause (1), for that Article reads:

"No person shall be deprived of his property save by authority of law."

If validly enacted law gives the State or a person a right to deprive another of his property, then such deprivation would be in accordance with Article 31 of the Constitution.

Clause (2) of Article 31 is in these terms:

"No property, movable or immovable, including any interest in, or in any company owning, any commercial or industrial undertaking, shall be taken possession of or acquired for public purposes under any law authorising the taking of such possession or such acquisition, unless the law provided for compensation for

the property taken possession of or acquired and either fixed the amount of the compensation, or specifies the principles on which, and the manner in which, the compensation is to be determined and given."

CIVIL.

1950.

Sudhindra Nath
Datta

v.

Sailendra Nath
Mitra.

Harries, C.J.

This clause clearly allows legislation of the type of Act V of 1947 provided compensation for the property taken is either fixed by the statute or the statute specifies the principles and the manner in which the compensation is to be determined. It is common ground that this statute under which the Government acted does comply with the provisions of Clause (1) as to compensation and if the case was governed by Article 31 we should be bound to hold that this act was *intra vires*, because it came precisely within the provisions of Clauses (1) and (2) of Art 31.

Clause (5) of the Article 31 however provides:

"Nothing in Clause (2) shall affect—

The provisions of any existing law other than a law to which the provisions of cause (6) apply....."

Clause (6) applies to enactments made not more than eighteen months before the commencement of the Constitution. The enactment before us was made in 1947 well over two years before the Constitution came into force. Therefore, the provisions of Clause (2) requiring compensation would not make this Act *ultra vires* even if no compensation was provided for as it has been passed more than eighteen months before the Constitution came into force.

In my opinion it is quite clear that Art. 19(1) (f) of the Constitution has no application to cases where a State, authority or person has compulsorily acquired property or obtained possession of property. The relevant provisions are to be found in Art 31 and it appears to me when tested by the provisions of Art. 31 this Act is *intra vires* and legal. What the Act does is to deprive the person of possession of the property and it cannot be said to be an enactment restricting his right to acquire, hold and dispose of the property as that phrase is used in Art. 19(1) (f). It does far more than restrict his right to hold the property. It

CIVIL.

1950.

Sudhindra Nath

Datta

v.

Sallendra Nath

Mitra.

Harries, C.J.

deprives him at least temporarily of possession of the property altogether. That being so, the case falls within Art 31 and the legislation to my mind is *intra vires*.

No other point was taken and that being so this petition fails and I would dismiss it with costs. Certified for two Counsel.

The interim injunction is discharged.

S. N. Banerjee, J.:—I agree.

Messrs. H. N. Datta & Co.: Solicitors for the Petitioner.

Mr. N. C. Mitra: Solicitor for the Respondent.

S.K.K.C.

Application dismissed.

ORIGINAL CIVIL.

*Before Mr. Justice J. P. Mitter.*CARLSBAD MINERAL WATER MANUFACTURING
CO. LTD.

v.

H. M. JAGTIANI*
—

CIVIL.

1950.

June, 19.

Constitution of India, Art. 226—Conditions precedent to the issue of a writ of mandamus—Whether writ of mandamus can be issued to enforce a contract.

In an application under Art. 226 of the Constitution for a writ of mandamus to compel the respondent as General Manager of the E. I. Railway to issue to the applicants licence for sale, throughout the Railway system, of ice, mineral waters etc. and to direct the Divisional Superintendent of Railways to permit the applicant to use the premises and stalls for sale of their products as before, the applicants claimed relief upon the allegation that the E. I. Railway administration has wrongfully refused to renew their catering contract in spite of a subsisting agreement for such renewal.

Held—(i) It is clear that the powers given to High Courts under Art. 226 are to be exercised in accordance with the principles which govern the issue of writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. The powers of High Courts to issue such writ to "any person" can only mean the power to issue any such writ to any person to whom according to well established principles a writ lay.

(ii) A writ of mandamus cannot be issued to compel a person to enforce an agreement.

(iii) To determine whether it is incumbent on the respondent or not, regard must be had to the provisions of the Act under which it is said that the act ought to have been done or forborne.

(iv) The conditions precedent to the issue of a writ of mandamus appears to be:

* Matter No. 35 of 1950. In the matter of Article 226 of the Constitution of India.

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.

H. M. Jagtiani.

- (a) The applicant must show that there resides in him a legal right to the performance of a legal duty by the party against whom the writ of mandamus is sought.
- (b) The Court will not enforce the law of the land by the extraordinary remedy of a writ of mandamus in a case where an action at law lies for giving complete relief to the party complaining.
- (c) The writ is only granted to compel performance of duties of a public nature.
- (d) The Court as a general rule, in the exercise of its discretion, would refuse a writ of mandamus where there rests an alternative and specific remedy at law which is not less convenient, beneficial or effective.

Application for a writ of mandamus to compel the General Manager of the East Indian Railway to issue to the applicants, Carlsbad Mineral Water Manufacturing Co. Ltd., a license or licenses for the period 1st June 1950 to 31st March 1951 for sale, throughout the Railway system of ice, mineral waters and cordials and to direct the Divisional Superintendents of the Railway to permit the applicants to use the premises heretofore used by them as depots and stalls for the sale of their products.

The material facts will appear from the judgment.

Mr. I. P. Mukherjee for the Applicant.

The judgment of the Court was as follows:—

June, 19.

J. P. Mitter, J.:—This is an application for a Writ of Mandamus to compel the respondent H. M. Jagtiani as General Manager of the East Indian Railway to issue to the applicants a license or licenses for the period 1st June 1950 to 31st March 1951 for sale, throughout the railway system of ice, mineral waters and cordials, and to direct the Divisional Superintendents of the Railway to permit the applicants to use the premises heretofore used by them as depots and stalls for the sale of their products.

The applicants are manufacturers and caterers of ice and mineral waters. For 27 years or so they have worked as Railway

contractors for catering ice, aerated waters and cordials, to bona-fide passengers, Railway servants, Railway Institutes and hospitals and to refreshment room contractors over the entire system of the said Railway. The respondent was lately the Chief Commercial Manager, and is now the General Manager, of the East Indian Railway. The Head Office of the said Railway is at No. 105, Netaji Subhas Road, Calcutta.

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.
v.

H. M. Jagtiani.

J. P. Mitter, J.

The applicants' claim to relief is founded upon an allegation that the East Indian Railway Administration has wrongfully refused to renew their catering contract for a fresh term, inspite of a subsisting agreement for such renewal. They say that although during the last 27 years formal contracts embodying the terms and conditions of their services as caterers were periodically entered into by and between the parties, yet they often in fact rendered such services from time to time even without such formal contracts and that such services were accepted by the Railway Authorities as in continuation and/or renewal of the contract last expiring. It is said that in the course of such services it became necessary for them to expand their factory at Howrah by importing expensive and upto date machineries in order to meet the growing requirements of the said Railway Administration. It is the applicant's case that in or about 1928 they asked that subject to their services being satisfactory, the periodical catering contracts should thenceforward stand on a permanent basis with regard to renewals thereof, so that they could continue and improve their services by making further investments and thus pursue a policy of expansion of their factory to meet the growing demands of the said Administration. This proposal according to them, was accepted by the then Chief Operating Superintendent of the Railway who assured the applicants that no other contractor would be employed by the Administration so long as the applicants' services were satisfactory and that the periodical contracts would be renewed by the Administration from time to time as a matter of course. It is said that on the applicants insisting upon the said agreement or arrangement being incorporated into the then next contract, the said Administration, in order to remove the feeling of insecurity on the part of the applicants, convened a meeting of the various Divisional Superintendents of the said Administration. The said meeting was presided over by the said Chief Operating

CIVIL.

1936.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.

v.

H. M. Jagtiani.

J. P. Mitter, J.

Superintendent, and a copy of the minutes of the said meeting dated September 15, 1928 was forwarded to the applicants. The said minutes ran as follows:—

"It was agreed that a long-term contract should not be given to Messrs. Carlsbad Mineral Water Manufacturing Co. and it was considered that the assurance they have already received that so long as their work is satisfactory the contract will remain with them is sufficient guarantee to warrant this Company proceeding with any policy of expansion they may have in view."

It is said that in reliance upon the said agreement the applicants from time to time invested large sums of money amounting to several lakhs of rupees in enlarging their factory and equipping it with modern machineries of foreign manufacture. They claim that their services to the Administration have all along been satisfactory and that they have sold their products at the same rates as were fixed in 1923. They say further that since 1923 they have been in possession of a number of depots and stalls at different stations over the entire system of the said Railway and that they have paid rents in advance from year to year at rates fixed by the said Administration. The last of the catering contracts under which they have worked was executed on January 3, 1947, clause 3 whereof provided as follows:—

"This contract comes into force from the 1st day of January 1947 for a period of 3 years, provided always that it would be lawful for this contract to be terminated by either party giving three calendar months' notice in writing to the other on the expiry of which the licensee shall peacefully vacate the premises allotted to him."

It is said that in or about May 1949 the applicants, in the usual course and on the footing of the agreement for renewal paid rents in respect of such depots and stall in their occupation for a period commencing from April 1949 to March 1950, both inclusive, and that such rents were accepted without any objection, although the contract was due to expire on 31st December 1949. On or about 30th July 1949 the applicants requested the respondent, who was then the Chief Commercial

Manager of the Railway, to send a draft of the contract for the next term of 3 years from 1st January 1950 in renewal of the then current contract. In or about the first week of October 1949 the applicants sent one of their Directors, R. Sen Gupta, to interview the said Chief Commercial Manager who then informed him that the contract between the parties would be renewed as usual by the proper authorities and that the applicants should, in the meantime, proceed to make all preparations necessary for the next term. On 17th October, 1949 the applicants received an official communication from the Chief Commercial Manager saying "the new contract is being drawn up, a copy will be sent to you later. 'Thereupon the applicants made all preparations for necessary raw materials, bottles and other articles. It is said that they also started an ice factory of their own at considerable expense at the request and under the directions of the said Administration. The gravamen of the applicants' charge is that thereafter the said Chief Commercial Manager wilfully neglected and/or wrongfully refrained from getting the formal contract completed as agreed upon in renewal of the said contract of 1947 in the following circumstances: On 7th November 1949 the applicants were served with a notice dated 1st/3rd November 1949 signed by the said Chief Commercial Manager purporting to terminate the said contract dated January 3, 1947 in total disregard of the agreement for renewal and in breach of the express terms of the said current contract. The company objected to the said notice and insisted upon the renewal of the 1947 contract. It is stated by the applicants that thereafter one J. N. Das, who had in the meantime become the Chief Commercial Manager, purported to waive the said notice dated 1st/3rd November 1949, and by a letter dated December 30, 1949 served upon the Company on 3rd January, 1950; purported to extend the 'contract for the sale of ice and aerated waters on this Railway by a period of two months with effect from the 1st January 1950 without prejudice and irrespective of consideration of any other matter" and asked for "acceptance of the extension of the contract as stated above." It is said that thereafter the said Chief Commercial Manager similarly purported to extend the said contract for the month of March and then again for April 1950. It is the applicants' case that they never accepted such conditional extensions and pointed out that their services were being continued from 1st January 1950 upon

CIVIL.

1950.

Cairnsbad Mineral
Water Manufac-
turing Co. Ltd.

v.

H. M. Jagtiani.

J. P. Miller, J.

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co., Ltd.

v.

H. M. Jagtiani.

J. P. Mitter, J.

the same terms and conditions in performance of the agreement for renewal as aforesaid. "The applicants then point out that by a letter dated 27th April 1950 the said Chief Commercial Manager purported to extend again the said contract 'further by one month only with effect from 1-5-50 on the clear understanding that the contract will stand terminated with the expiry of the month of May 1950.' By this letter, according to the applicants, they were for the first time required to vacate the premises allotted to them and to remove all their properties immediately on the expiry of the month of May 1950. The applicants contend that the person acting as the Chief Commercial Manager had no authority either to extend the contract of 1947 or to terminate the same unless he was in fact authorised by the Governor General in Council or the President of India, as the case may be. They contend that the said notices purported to have been given by the Chief Commercial Manager including the one dated 27th April 1950 were void, inoperative and of no consequence and not binding upon the applicants. On 4th May 1950 the applicants informed the then Chief Commercial Manager that they could not accept any extension of the contract as set out in his letter of 27th April 1950, that they were entitled to a renewal of their contract for a further period of three years from 1st January 1950 and that it was on the basis of such renewal that they had continued to render their services from 1st January 1950. They say that they paid rents upto March 1951 and that such rents were accepted by the Administration. According to them, the notice of 27th April 1950 was malafide, unreasonable, unlawful and without any authority and was of no effect. On 24th May 1950 the applicants' solicitors addressed the following letter to the Chief Commercial Manager, East Indian Railway:

"Dear Sir,

Cltts:- Messrs. Carlsbad Mineral Water Mfg. Co., Ltd. of
No. 14, Watkins Road, Howrah.

Sub: Ice and Aerated Waters.

Your letter No. CCM/C/22-C/PTI dated 15th instant addressed to our clients abovenamed and received by them on the 17th following has been handed over to us with instruction to address you as follows:—

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.
v.

H. M. Jagtiani.

J. P. Mitter, J.

It appears that the Administration has wrongfully refused to renew the contract for a fresh term without proper notice inspite of the subsisting agreement for such renewal. Furthermore, inspite of the fact that the Administration accepted rent from our clients in advance till March 1951 they have been wrongfully and unreasonably required to vacate the stalls and depots under their occupation. Our clients further understand that the Administration is preparing to evict our clients forcefully by the help of the police knowing fully well that such action on the part of the Administration will entail serious disturbance and consequent loss of the valuable properties belonging to our clients spread over the entire system.

In these circumstances please take notice that unless you forbear from taking such illegal step our clients will have no other alternative but to take protection from a competent Court.

An early reply will much oblige.

Yours faithfully,
(Sd.) Roy Chowdhury & Co."

At the date of this application this letter remained unanswered. The applicants contend that in all the circumstances of the case it was clearly incumbent upon the respondent in his public character to forbear from ousting the applicants in contravention of the existing law of the land, that they have no other specific and/or adequate remedy and that they are accordingly entitled to a Writ of Mandamus, which would afford them adequate, expeditious and complete reliefs.

The respondent contests this application on several grounds. He contends that the application is misconceived inasmuch as it seeks to enforce an alleged agreement (which is denied) to enter into another agreement. It is contended next that the contract, if any, being one for personal services, cannot be specifically

CIVIL,

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.

H. M. Jagtiani.

J. P. Mitter, J.

enforced. It is also said that there was no consideration for the alleged agreement and that the same was, in any case, void for non-compliance with the provisions of Section 175 of the Government of India Act. It is contended further that the acts complained of in the petition were purely executive or administrative, done bonafide in the interests of the Railway Administration, and that most of the applicants' depots and stalls, with reference to which certain acts are required to be done by the respondents, are outside the State of West Bengal. It is also contended that the applicants' relief, if any, is by way of a suit in respect of which notice under section 80 of the Civil Procedure Code claiming Rupees twenty six lakhs as damages has already been served. It is contended further that the contractors, who were appointed with effect from 1st June 1950, not having been impleaded as respondents, this application is bad for non-joinder of parties. It is contended lastly that the resolution of September 15, 1938 did not amount to an agreement and is not binding on the Railway Administration. As to the merits on facts, the respondents case is that the services rendered by the applicants during the last few years have been unsatisfactory; that there were numerous complaints against the applicants both from passengers and Railway servants; and that on investigation many of these complaints were found to have been well-founded. It is said that the contracts given to the other contractors from 1st June 1950 contain more stringent conditions than those which governed the contract with the applicants. As to the applicants' allegation that "depot rents" or license fees were accepted by the Administration, the respondents' case is that such payments were accepted by local officer under a misapprehension and that the applicants have refused to take a refund of the money so paid inspite of being asked to do so. In paragraph 16 of the affidavit of R. K. Bokil, Deputy Chief Commercial Manager (goods), affirmed on June 6, 1950, have been set out the circumstances leading up to the termination of the applicants' contract. The allegations made there are based upon Official records of the Administration. It would appear from this narrative that on November 26, 1949, the applicants addressed a letter to the Secretary, Railway Board, on the subject of certain difficulties which they experienced in the execution of their contract. In this letter no mention was made that there had been an agreement to renew their contract, nor was any claim made that the applicants were entitled to

permanent renewal of their contract. The notice under section 80 of the Code of Civil Procedure alluded to above contains no reference to any alleged agreement for extension or to any alleged preparations undertaken on the basis of any such agreement. The respondent's case is that in a letter dated May 24, 1950 written by the applicants' Solicitors to the Chief Commercial Manager, East Indian Railway, it was alleged for the first time that there was subsisting agreement for renewal of the contract. It is said that the applicants had ample notice of the fact that their contract was not going to be renewed and that they should have taken all necessary steps for removal of their properties. As to the extensions for the months of January, February, March and April, 1950 the respondent's case is that the applicants rendered their services during the said period as licensees and that they are liable to be ejected from Railway premises. Both the respondent and the said J. M. Das by separate affidavits, say that the facts contained in the affidavit of R. K. Bokil are true as far as they are aware.

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.
v.

H. M. Jagtiani.

J. P. Mitter, J.

For the purpose of disposing of this application it is not necessary to refer to further facts. The applicants' claim to relief is founded upon the allegation that the Administration has wrongfully refused to renew the contract for a fresh term without proper notice inspite of the subsisting agreement for such renewal. This case is to be found in the letter of May 24, 1950 which their solicitors addressed to the Chief Commercial Manager, East Indian Railway. This case is also to be found in their petition, and in particular, in paragraph 19 thereof. The relevant allegation in the said paragraph is as follows:

"The Company never accepted such conditional extensions as aforesaid and pointed out that its services were being continued from 1st January 1950 upon the same terms and conditions in performance of the agreement for renewal as aforesaid."

It will be recalled that by a letter of April 27, 1950 the Chief Commercial Manager intimated to the applicants that their contract would stand terminated with the expiry of the month of May 1950 and that they should vacate the premises and remove all their properties immediately on the expiry of the month of May 1950.

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co., Ltd.

v.

H. M. Jagtiani.

J. P. Mitter, J.

The question which I have to decide is whether in these circumstances the applicants are entitled to any of the reliefs claimed in this petition. Even assuming the applicants' case to be true, it is my view that they are not entitled to a Writ of Mandamus or to an order in the nature of mandamus. Mr. I. P. Mukherjee on behalf of the applicants was conscious of this difficulty and argued that the facts stated in the petition made out a case of a license coupled with a grant and that the Administration was accordingly not entitled to evict the applicants. There is no reference to this case either in the petition or in any of the letters or documents produced by either of the parties.

The petition is entitled, *inter alia*, "In the matter of Article 226 of the Constitution of India and in the matter of the Specific Relief Act." Mr. Mukherjee argued that whatever might have been the position as to the purpose for which an order in the nature of a mandamus issued prior to the Constitution coming into force, the High Courts have now power under Article 226 of the Constitution to issue to any person directions, orders, or writs including writs in the nature of habeas corpus, mandamus etc. for any purpose and that therefore an order in the nature of a mandamus could issue for the reliefs asked for in this petition. The language of Article 226 is very wide, and there can be no doubt that the Article concerned gives the widest possible powers to the High Courts within the ambit of the provision. Article 226 is as follows:

"(1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

The two matters which call for discussion are—(1) the power of the High Court to issue any of the writs mentioned in the Article "to any person" and (ii) "for any other purpose." At first sight it would appear that the language used in Article 226

imposes no limits whatsoever as to the category of persons to whom, and the purpose for which, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari or any of them may be issued by the High Court. But once the origin and history of the High Prerogative Writs are remembered, it is clear that the powers given to a High Court under Article 226 are to be exercised in accordance with the principles which governed the said writs. The power of the High Court to issue such a writ to "any person" can only mean the power to issue such a writ to any person to whom, according to well established principles, a writ lay. That a writ may issue to an appropriate person for the enforcement of any of the rights conferred by Part III is clear enough from the language used. But the words "and for any other purpose" must mean "for any other purpose for which any of the writs mentioned would, according to well-established principles, issue." That the respondent is a person to whom a writ of mandamus may issue cannot be doubted. The question is whether a writ of mandamus could issue for the purpose alleged. In my view, a writ of mandamus cannot issue to compel a person to enforce an agreement. So far as Section 45 of the Specific Relief Act is concerned, the applicants have to show that the doing or the forbearing, which it is sought to enforce, is under any law for the time being in force, clearly incumbent on the respondent in his public character and that the applicants have no other specific and adequate legal remedy. To determine whether it is incumbent or not, regard must be had to the provisions of the Act under which it is said that the act ought to have been done or forborne. Even assuming that there was an agreement to renew the applicants' contract, I know of no statute under which it is incumbent on the respondent to do what it is said he must be compelled to do. No one can suggest that in the circumstances of this case the applicants have no other specific and adequate legal remedy. Indeed, the applicants have already given notice under Section 80 of the Code of a proposed suit for damages for the alleged breach.

CIVIL.

1950.

Carlsbad, Mineral
Water Manufac-
turing Co. Ltd.

v.

H. M. Jagtani.

J. P. Mitter, J.

Having regard to Article 226 of the Constitution, considerations which would ordinarily arise in an application under section 45 of the Specific Relief Act may for the moment be ignored. The question then is—Can this application nevertheless succeed

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.

v.

H. M. Jagtiani.

J. P. Mitter, J.

if it is judged by the principles applicable to a writ of mandamus? The writ of mandamus was a high prerogative writ. In form it was a command directed to any person, corporation, or inferior court of judicature requiring him or them to do some particular thing therein specified which appertained to his or their office and was in the nature of a public duty. As is stated in Section 4, page 744 of Volume IX of Halsbury's Laws of England (Hailsham Edition), the purpose of the writ was to supply defects of justice; and accordingly it issued to the end, that justice might be done, in all cases where there was a specific legal right and no specific legal remedy for enforcing such right. That was the nature of the high prerogative writ of mandamus. It appears that the prerogative writ is no longer issued, its place being taken by an 'order of mandamus.' The conditions under which the order is issued in England are, however, the same as in the case of the prerogative writ: See Administration of Justice (Miscellaneous Provisions) Act, 1938, Section 7. The grant of an order or a writ of mandamus is, as a general rule, a matter for the discretion of the Court. It is said that it is not a writ of right and that it is not issued as a matter of course. Some of the conditions precedent to the issue of mandamus appear to be:

- (i) the applicant for a writ of mandamus must show that there resides in him a legal right to the performance of a legal duty by the party against whom the mandamus is sought;
- (ii) the Court will not interfere to enforce the law of the land by the extraordinary remedy of a writ of mandamus in cases where an action at law will lie for complete satisfaction. In order, therefore, that a mandamus may issue to compel something to be done, it must be shown that the statute imposes a legal duty;
- (iii) the writ is only granted to compel the performance of duties of a public nature;
- (iv) the Court will, as a general rule, and in the exercise of its discretion, refuse a writ of mandamus when there is an alternative specific remedy at law which is not less convenient, beneficial and effective;

(v) when mandamus is refused on the ground that there is another special remedy, it is a remedy at law that is referred to.

CIVIL.

1950

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.

v.

H. M. Jagtiani.

J. P. Mitter, J.

Judged by the above principles, the present application, in my view, must fail. The question whether rights under a contract can be the subject of a mandamus was considered in *P. K. Banerjee v. L. J. Simonds*, (1). Gentle J. on a review of the authorities held that a mandamus would not issue to enforce a contract. In this connection the learned Judge quoted the following observation of Patterson, J. in *Ex parte Pering* (2).

"We cannot grant a mandamus to a public Board and order them to carry a contract into effect."

The learned Judge also cited *Income Tax Commissioner, Bombay Presidency and Aden v. Bombay Trust Corporation* (3) in which their Lordships of the Judicial Committee observed as follows:—

"Before mandamus can issue to a public servant, it must therefore be shown that a duty towards the applicant has been imposed upon the public servant by a statute so that he can be charged thereon, and independently of any duty which as servant he may owe to the Crown, his principal."

Gentle J. proceeded:

"Their Lordships make no reference to a right under a contract being enforceable by mandamus; they clearly enunciate that the duty imposed upon a public servant, which can be the subject of mandamus, is a statutory duty."

In the case before us, the applicants cannot point to any such duty on the part of the respondent. What they seek to do, even assuming their case to be true, is to enforce the ordinary law of the land by the extraordinary remedy of a writ of mandamus. The duty alleged on the part of the respondent cannot possibly be a duty of a public nature.

(1) [1947] A.I.R. Calc. 307.

(2) (1836) 4 Ad. and El. 949 (950).

(3) (1936) L.R. 63 I.A. 408.

CIVIL.

1950.

Carlsbad Mineral
Water Manufac-
turing Co. Ltd.

v.

H. M. Jagtiani.

J. P. Miller, J.

As the applicants have given notice under Section 80 of the Code of a proposed Suit against the Union of India, I do not propose to discuss the merits of their case on the facts, lest either party might be prejudiced. In resisting this application many matters have been raised by the respondent, but having regard to my view that a mandamus does not lie to enforce a contract, it is not necessary to decide these issues. An order in the nature of a mandamus is in the discretion of the Court. In this case the factum of an agreement, which is the foundation of the application, is in dispute, and I cannot in all the circumstances of this case, use my discretion in the applicants' favour. In my view, the applicants have failed to make out any case for the grant to them of any of the reliefs asked for.

In the result, this application is dismissed with costs.

Messrs. Roy Chowdhury & Co.: Solicitors for Applicants.

S.K.R.C.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice R. P. Mookerjee and
Mr. Justice K. C. Chunder.

MAHARAJADHIRAJ UDOY CHAND
MAHATAB BAHADUR

CIVIL.

1950.

September, 7.

v.

SAROJINI DEBI AND ON HER DEATH HER HEIRS AND LEGAL
REPRESENTATIVES SUDHIR RANJAN SEN AND OTHERS.*

Bengal Tenancy Act (VIII B.C. of 1885), rent due under—Falls due according to Kists—Land Revenue Sales Act (XI of 1859), Section 7—Object of the notice—B. T. Act, not the entire law relating to landlord and tenant—Not pari materia for construing special provisions in Special Acts—B. T. Act, Section 72, not attracted in respect of a sale under Act XI of 1859.

The rent due under the B. T. Act falls due according to the Kists or instalments and not from day to day.

Section 7 of Land Revenue Sales Act provides that notices are required to be served "forbidding the ryots and undertenants to pay to the defaulting proprietor any rent which has fallen due after the day fixed for the last day of payment, on pain of not being entitled to credit in their accounts with the purchaser for any sum so paid." One of the objects of this notice is to prevent the ryots from paying to the defaulter any rent which may fall due after the day fixed for the last day of payment.

A notice which is issued under Section 7 of Act XI of 1859 when an estate is notified for sale is sufficient to put the tenants on their guard from making any payment to the defaulting proprietor any rent which falls due after the last day of payment.

The Bengal Tenancy Act does not purport to give an exhaustive enumeration of all the incidents of tenancy but amends and consolidates only certain enactments and not the entire law relating to landlord and tenants.

* Appeal from Appellate Decree No. 1001 of 1946 against the decree of N. Ray Chaudhury, Esq., District Judge of Zillah Hooghly, in Rent Appeal No. 54 of 1945, dated the 7th of December, 1945, modifying the decree of E. Rahman, Esq., Subordinate Judge, 2nd Court, Hooghly, dated the 38th of August, 1944.

CIVIL.

—

1950.

Maharajadhiraj
Udoy Chand Ma-
hatab Bahadur.
v.
Sarojini Debi.

The said Act is not *pari materia* and cannot be referred to for construing the special provisions in the Special Acts.

The Bengal Tenancy Act does not supersede either the procedure provided in or the substantive rights created by Act XI of 1859.

Section 72 of the Bengal Tenancy Act is not attracted in respect of a sale under Act XI of 1859.

Cases followed and referred to:—

Satyendra v. Nilkantha (1); *Sree Sree Radhagobinda Deb Thakur v. Girija Prasanna Mukherji* (2); *Mahomed Aga v. Jadu Nandan Jha* (3); *Chandrabinode v. Alabux* (4); *Turner Morrison & Co. v. Monmohan Chowdhury* (5); *Sarat Chandra v. Asiman Bibi* (6).

Appeal by the Defendant No. 1.

Suit for patni rent for the last quarter of 1347, the first quarter of 1348 and the second and the third quarters of 1349 B.S.

The material facts will appear from the judgment.

Mr. Purusottam Chatterjee for the Appellant.

Messrs. Hemendra Chandra Sen, Satyendra Chandra Sen and Sachindra Chandra Das Gupta for the Respondents.

Mr. Bireswar Chatterjee for the minor Respondent represented by the Deputy Registrar.

The judgments of the Court were as follows:—

September, 7.

R. P. Mookerjee, J.—Separate accounts were registered under the Hooghly Collectorate in respect of Touzi No. 40. Separate accounts Nos. 40/2 and 40/3 were sold on the 25th June 1941 for arrears of revenue and were purchased by the plaintiff Sarojini Debi. Each of these two separate accounts comprised a

(1) (1893) I.L.R. 21 Calc. 383.

(2) (1931) I.L.R. 59 Calc. 186.

(3) (1905) 2 C.L.J. 325.

(4) (1929) I.L.R. 48 Calc. 184.

(5) (1931) I.L.R. 58 I.A. 440; 36 C.W.N. 29.

(6) (1904) I.L.R. 31 Calc. 725.

7 anna share of the Touzi. Under this Touzi defendant No. 1 Maharaja of Burdwan who is the appellant in this appeal holds a patni at an annual rent of Rs. 3,000/-, in his capacity as Trustee executor of the estate of late Bholanath Singh Roy. After the purchase in the revenue sale as aforesaid Sarojini Debi sued the Maharaja in respect of Patni rent for the last quarter of 1347, the first quarter of 1348 and the second and the third quarters of 1349 B.S. in her 14 annas share, impleading the proprietors of the remaining two annas share as proforma defendants Nos. 2 to 4. During the pendency of this suit, and at the instance of the original proprietors of that separate account the sale of the separate account Nos. 40/3 was set aside on the 12th May, 1943. After the sale had been set aside the original proprietors of that separate account were impleaded as defendants and were on the prayer of the latter joined as co-plaintiffs in the pending suit. They claimed arrears of patni rent in their 7 annas share for the second and the third quarters of 1349 B.S. The defendant Maharaja had paid the rent due for the last quarter of 1347 and the first quarter of 1348 B.S. to the former proprietors of the two separate accounts. He admitted liability to Sarojini Debi the original plaintiff, for the arrears for the second and third quarters of 1349 B.S. although the sale for arrears of revenue was held on the 25th of June 1941, the sale had taken effect as from the 28th of March 1941 viz. the day after the latest day of payment of the kist which was in arrears. The Maharaja defendant No. 1 received notice of the sale on the 21st September 1941, i.e. after the rent for the last quarter of 1347 B.S. and the first quarter of 1348 B.S. had been paid to the original proprietors of the separate accounts. The Maharaja claimed protection under section 72 of the Bengal Tenancy Act and maintained that he was not liable to the co-plaintiffs in respect of the kists which had already been paid to the original proprietors before the receipt of the notice of the auction purchase by him.

The learned Subordinate Judge accepted the defence and passed a decree in favour of the original plaintiff Sarojini in respect of half of her claim for the rent for the second and the third quarters of 1349 B.S.

On appeal by the plaintiff Sarojini against the dismissal of her claim for the last quarter of 1347 and the first quarter of 1348 B.S. the learned District Judge held that section 72 of the

CIVIL.

1950.

Maharajadhiraj
Uday Chand Ma-
hatab Bahadur.

v.

Sarojini Debi.

Mookerjee, J.

CIVIL.

Bengal Tenancy Act was not attracted in respect of a sale held under Act XI of 1859.

1950.

Maharajadhiraj
Uday Chand Ma-
hatab Bahadur.

v.

Sarojini Debi.

The present appeal is on behalf of the Maharaja defendant No. 1 and the only point raised is whether section 72 of the Bengal Tenancy Act is attracted in respect of a sale under Act XI of 1859.

Section 72 of the Bengal Tenancy Act provides.

Mookerjee, J.

"A tenant shall not, when his landlord's interest is transferred, be liable to the transferee for rent which became due after the transfer and was paid to the landlord whose interest was so transferred, unless the transferee has before the payment given notice of the transfer to the tenant." The provisions as contained in this section are slightly different from the law as under the Transfer of Property Act. The rent due under the B. T. Act falls due according to the kists or instalments and not from day to day [*Satyendra v. Nilkanta* (1)].

If section 72 is attracted in the case of revenue sales the defendant No. 1 is entitled to the relief claimed. Under section 7 of the Land Revenue Sales Act XI of 1859 notices are required to be served "forbidding the ryots and under tenants to pay to the defaulting proprietor any rent which has fallen due after the day fixed for the last day of payment, on pain of not being entitled to credit in their accounts with the purchaser for any sums so paid." One of the objects of this notice is to prevent the ryots from paying to the defaulter any rent which may fall due after the day fixed for the last day of payment [*Sree Sree Radhagobinda Deb Thakur v. Girija Prasanna Mukherjee* (2) and *Mahomed Aga and another v. Jadu Nandan Jha and others* (3)].

Under section 28 of the Land Revenue Sales Act immediately upon a sale becoming final and conclusive a certificate of title is to be given to the purchaser in the form prescribed in Schedule A of the Act. The certificate as required under schedule A is in the following terms:

"I certify that A.B. has purchased under Act XI of 1859 the Mahal (or share of a Mahal) specified below, standing in the

(1) (1893) I.L.R. 21 Calc. 383.

(2) (1931) I.L.R. 59 Calc. 186.

(3) (1905) 2 C.L.J. 325.

Touzi of district—and that his purchase took effect on the day of . . . (being the day after that fixed for the last day of payment)."

CIVIL.

1950.

Maharajadhiraj
Udoy Chand Mahatab Bahadur.

v.

Sarojini Debi.

Mookerjee, J.

If the provisions contained in section 7 be taken along with section 28 and schedule A of the Act it is clear that the Revenue Sale purchaser gets title to the Mahal with effect from the day following the last day of payment and if payment is made by the ryot or under ryot to the defaulting proprietor before the last day for payment, such payment will enure to the benefit of the ryot. If any payment be made subsequent to the said last day of payment the ryot is not entitled to claim any benefit in respect of such payment from the purchaser at the Revenue Sale. There is no question here of any notice subsequent to the Revenue Sale being served on the ryot as required under section 72 of the Bengal Tenancy Act. A notice which is issued under section 7 of Act XI of 1859 when an estate is notified for sale is sufficient to put the tenants on their guard from making any payment to the defaulting proprietor any rent which falls due after the last day of payment.

Reference may in this connection be also made to section 30 of the Land Revenue Sales Act which provides that the party certified as a proprietor of an estate by purchase under this Act shall be answerable for all instalments of the Government Revenue which may fall due after the latest day of payment.

It is also contended before us that Act XI of 1859 is controlled by the provisions contained in the Bengal Tenancy Act (VIII of 1885) which was passed subsequently and the provisions contained in section 72 of the latter Act should be taken to have repealed by implication certain provisions of Act XI of 1859.

The Bengal Tenancy Act does not purport to give an exhaustive enumeration of all the incidents of tenancy but amends and consolidates only certain enactments and not the entire law relating to landlord and tenants [*Chandrabhinode v. Alabux* (1)]. Further the Bengal Tenancy Act is not *pari materia* and cannot be referred to for construing the special provisions in the Special Acts. [*Turner Morrison & Co. v. Monmohan Chowdhury*, (2)]. Both as regards the procedure to be followed

(1) (1920) I.L.R. 48 Cal. 184.

(2) (1931) L.R. 58 I.A. 440; 36 C.W.N. 29.

CIVIL.

1950.

Maharajadhiraj
Udoy Chand Ma-
hatab Bahadur.

v.

Sarojini Debi.

Mookerjee, J.

for the realisation of Government Revenue as also as to the rights given to the purchaser under Act XI of 1859 the provisions are materially different from those contained in the Bengal Tenancy Act.

Section 195 of the Bengal Tenancy Act further saves any other special or local law not repealed either expressly or by necessary implication by this Act. The provision contained in the earlier Act of 1859 affirms the rights of the auction purchaser and declares the rights of the purchaser. The provision contained in section 72 of the Bengal Tenancy Act merely negatives the responsibility of the tenant to the extent as provided in that section. If the contention is to be accepted that section 72 of the Bengal Tenancy Act has by necessary implications repealed certain provisions of Act XI of 1859 we would be landed in an impossible position. It is not possible to introduce the provisions contained in section 72 of the Bengal Tenancy Act in the body of Act XI of 1859 merely so far as limiting the liability of the tenant to the date of transfer of the interest of the proprietor without affecting the entire scheme of the earlier Act. It has not and cannot be contended that the Bengal Tenancy Act supersedes either the procedure provided in or the substantive rights created by Act XI of 1859.

So far as Act XI of 1859 is silent the provisions of the Bengal Tenancy Act may be introduced for interpreting the rights of the parties. In *Sarat Chandra v. Asiman Bibi*, (1) it was held that in determining who are to be deemed to be protected as holders of occupancy ryots reference may be made to section 30 of the Bengal Tenancy Act, as being the "laws for the time being in force" and relief granted accordingly.

This contention cannot therefore be accepted.

This appeal is dismissed with costs and the judgment and decree of the court of appeal below are affirmed.

K. C. Chunder, J.:—I agree.

R.M.

Appeal dismissed.

(1) (1904) I.L.R. 31 Calc. 725.

APPEAL FROM ORIGINAL CIVIL.

Before Sir Arthur Trevor Harries, Kt., Chief Justice and
Mr. Justice S. N. Banerjee.

DEVJI SHIVJI

v.

SANTI SARUP CHATURVEDI.

CIVIL.

1950.

June, 30.

*Limitation Act (IX of 1908) Article 164—Setting aside an ex parte decree—
Civil Procedure Code (Act V of 1908), Order 9 rule 13, if applicable on
the original side of the High Court.*

The question involved in this appeal was whether the period of limitation prescribed by article 164 of the Limitation Act can be applied to an application made on the original side of this Court for setting aside an *ex parte* decree.

Held—That Order 9 Rule 13 of the Civil Procedure Code was intended to apply and it does apply to the original side of this Court and it is no answer to say that it should be held not applicable because the procedure of this Court makes it difficult to apply the Rule.

S. N. Banerjee v. H. S. Suhrawardy (1) dissented from

Surendra Nath Roy v. Hrishikesh Saha (2) followed.

Appeal by the Judgment debtor.

Application to set aside an *ex parte* decree made against the appellant.

The material facts will appear from the judgment.

Mr. A. N. Roy for the Appellant.

Mr. H. Rahaman for the Respondent.

* Appeal from Original Order No. 71 of 1950 against the order of S. B. Sinha, J. refusing to set aside an *ex parte* decree made against the Appellant.

(1) (1927) 32 C.W.N. 10.

(2) (1941) 46 C.W.N. 280.

CIVIL.

1950.

Devji Shivji

v.

Santi Sarup
Chaturvedi.

June, 30.

The judgment of the Court was as follows:—

Harries, C.J.:—This is an appeal from an order of Sinha J. refusing to set aside an *ex parte* decree made against the appellant.

It was admitted before Sinha J. that the defendant was served with a summons. It appears that the defendant wrote letters to the Registrar of this Court saying that he was ill, but the learned Registrar of this Court made it clear that he could not interfere and that the appellant would have to take proper steps in the case. The appellant never entered appearance and in due course the case came into the undefended list and a decree was made in favour of the plaintiff. The date of the decree is November 28, 1949.

The period of limitation for applications to set aside an *ex parte* decree is thirty days from the date of the decree or, where no summons was duly served, thirty days from the date when the applicant had knowledge of the decree, the period of limitation being provided by Article 164 of the Indian Limitation Act. The appellant having admitted that he was duly served with a summons the period of limitation applicable in this case is thirty days from the date of the decree. An application, however, to set aside this *ex parte* decree was not made until February 21, 1950 and was therefore over fifty days late. No application was made to this Court to condone the delay and to extend the time for making the application under section 5 of the Limitation Act.

The application came in due course before Sinha J. and the only point that appears to have been taken before Sinha J. was that this period of limitation prescribed by Article 164 did not apply to applications made on the Original Side to set aside *ex parte* decrees.

Reliance was placed by the appellant upon a decision of this Court in *S. N. Banerjee v. Huseyn Shahied Suhrawardy* (1). In that case it was held that Or. 9, r. 13 of the Code of Civil Procedure is directed in terms to a practice different from that which

(1) (1927) 32 C.W.N. 10.

obtains on the Original Side of the High Court. It refers to cases in Mofussil Courts where the procedure as to appearance is different and although it has been the practice on the Original Side to follow the analogy of that rule on general principles of justice, the High Court on the Original Side cannot be tied down to its exact words on the footing that they are directly applicable and exhaustive and has unfettered discretion to restore suits on proper terms independently and in spite of Or. 9, r. 13.

CIVIL.
—
1950.
Devji Shivji
v.
Santi Sarup
Chaturvedi.
—
Harries, C.J.

I find it rather difficult to appreciate why Or. 9 r. 13 of the Code of Civil Procedure which is part of the statutory law of the land is not applicable to proceedings in the High Court on its Original Side, because the procedure on that side of the High Court is different from the procedure in Mufussil Courts. If the procedure followed on the Original Side of this Court makes it difficult to apply the general law of the land that is no reason for holding that the general law of the land does not apply to this High Court.

Order 49 r. 3 of the Code of Civil Procedure expressly provides that certain rules shall not apply to any Chartered High Court in the exercise of its Ordinary or Extraordinary Original Civil Jurisdiction. But it is to be observed that none of the rules in Or. 9 are stated to be inapplicable to Chartered High Courts exercising Ordinary Jurisdiction. It appears to me therefore that Or. 9 r. 13 was intended to apply and does apply to the Original Side of this High Court and it is no answer to say that it should be held not applicable because the procedure of this Court makes it difficult to apply the rule.

The matter however does not rest there because there is an express decision of a Bench of this Court that Or. 9 r. 13 does govern applications for setting aside *ex parte* decrees on the Original Side and that the period of limitation is that prescribed by Article 164 of the Limitation Act. The Bench decision to which I have already made reference was considered in *Surendra Nath Roy v. Hrishikesh Saha* (1). But the Bench held that there was no reason why the matter should not be governed by Article 164 of the Limitation Act which provided that an application for an order to set aside a decree passed *ex parte* should be made

(1) (1941) 46 C.W.N. 280.

CIVIL.

1950.

Devji Shivji
v.
Santi Sarup
Chaturvedi.

—
Harries, C.J.

not later than thirty days from the date of the decree. The Court was not prepared to come to the conclusion that such an application on the Original Side was not made under Or. 9 r. 13 of the Code of Civil Procedure, but was made under some provision not contained in the Code of Civil Procedure and therefore the Limitation Act would not be applicable.

I may add that the Bench case which held that applications for setting aside *ex parte* decrees made on the Original Side were not made under the provisions of Or. 9 r. 13 has been constantly dissented from and that the view of this court for a period of time has been the view expressed in the later Bench decision. Sinha J. was of opinion that he was bound by this later Bench decision and therefore held that the period of limitation was thirty days from the decree. He held accordingly that the application was out of time.

Mr. Roy who has appeared on behalf of the appellant has contended that there was in this case sufficient cause for extending the time for making this application. The appellant however is in this difficulty that he filed no application under section 5 of the Limitation Act for extension of time and produced no evidence before the learned Judge which would justify an extension of time. Indeed it is conceded that the learned Judge was not asked to extend the time on any ground whatsoever. The whole case before the learned Judge was confined to the one point as to whether Article 164 of the Limitation Act applied to applications made for setting aside decrees on the Original Side of this Court. Reliance was placed on the view of Rankin, C.J. that Or. 9 r. 13 of the Code of Civil Procedure had no application to such applications and therefore Article 164 would not apply. The learned Judge was never asked to consider whether or not there were grounds upon which he could extend the time.

Although no application under section 5 of the Limitation Act was made in the court below and although no evidence was called to support such an application, Mr. Roy has asked us to hold that this is a case in which time should have been extended.

If we extended the time under section 5 of the Limitation Act we would in effect be rendering nugatory the precise terms of Article 164 of the Limitation Act. That provides that time will only begin to run from knowledge of the decree when a

summons has not been served. When a summons has been duly served time begins to run from the date of the decree.

However it appears to us that there are really no grounds whatsoever for extending time even if an application had been made under section 5 of the Limitation Act. The appellant in his petition suggested that he was oldish and suffered from high blood pressure and asthma. The appellant has been sitting in Court and was pointed out to us. He cannot be described as a very old man and he does not seem to be a man who is wholly unfit to attend to his business.

What is stated in the petition is that the appellant had no knowledge of this decree until February 14, 1950. However that statement is not true because a letter was exhibited for some reason or other which is printed at page 17 of the paper book. It is clear from the terms of that letter that the appellant was informed by Messrs. Place, Siddons & Gough, Stockbrokers of this city, by a letter of January 14, 1950 that a decree had been passed against him. Further it is clear that the appellant received that letter and acknowledged it on January 17, 1950. Therefore his statement that he knew nothing about this decree until February 14, is false. If he knew of this decree as he must have known on January 16, even then time had expired. In such a case we should have expected the application to set aside the decree to have been made with the utmost despatch. But it was not made until more than thirty days had elapsed from the date of the knowledge of the decree. It seems to me that the appellant was dilatory and there appears to be no grounds at all upon which we could condone the delay. It seems from the letter of Messrs. Place, Siddons & Gough that some negotiations for settlement were proceeding and it may well be that no application was made to set aside the decree until those negotiations broke down. In any event I find it impossible to interfere with the order of Sinha J. in these circumstances.

In the result therefore this appeal fails and I would dismiss it with costs. The order staying execution is discharged and the respondent is entitled to the costs of that application.

S. N. Banerjee, J.:—I agree.

Mr. C. C. Bose: Solicitor for the Appellant.

Messrs. S. S. Banerjee & Co.: Solicitors for the Respondent
S.K.R.C. *Appeal dismissed.*

Civil.

1950.

Devji Shivji
v.

Santi Sarup
Chaturvedi.

Haries, C.J.

ORIGINAL CIVIL.

*Before Sir Arthur Trevor Harries, Kt., Chief Justice and
Mr. Justice S. N. Banerjee.*

CIVIL.

1951.

January, 22.

SATYENDRA CHANDRA SEN AND OTHERS

v.

S. B. TRADING CO., LTD.*

West Bengal Premises Rent Control (Temporary Provisions) Amendment Act, 1950, (LXII of 1950) Section 6—Whether the word “may” should be read as “shall” in the Section—Court’s power under the Section is discretionery.

It is to be noted that in Section 18(g) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950 the word is “shall”. But in the Section 6 of the Amendment Act the word is “may”. The legislature had made a difference in the two Sections and there is no doubt that by using the word “may” it has conferred a discretion on the Court in the matter of rescinding or varying the decree.

Being a matter of discretion the Court will take into consideration all the facts and circumstances of the case, before it makes an order under Section 6 of the Amendment Act. The Court should not make an order unless it is just and equitable to do so.

Application by the Defendants.

Suit for ejectment, arrears of rent and mesne profits.

The material facts will appear from the judgment.

Mr. Ajit Dutt with Mr. Satya Priya Ghose for the Applicants.

Mr. A. K. Sen with Mr. S. Roy for the Respondents.

The following judgments were delivered—

January, 22.

S. N. Banerjee, J.:—This is an application by the tenants claiming relief under section 6 of the West Bengal Premises Rent Control (Temporary Provisions) Amendment Act, 1950. That section is as follows:—

* In the matter of an application re: Original Civil Suit No. 2218 of 1949.

"Power of Court to rescind or vary decrees and orders in certain cases—Where at any time between the commencement of the said Act and of this Act, an order or decree for the recovery of possession of any premises has been made or passed by any Court but possession of such premises has not been recovered in execution of such order or decree and the Court is of opinion that the order or decree would not have been made or passed if this Act had been in force when the order or decree was made or passed, the Court may, on application by the tenant within sixty days of the commencement of this Act rescind or vary the order or decree on such terms and conditions as it deems necessary for the purpose of giving effect to the provisions of section 18 of the said Act as amended by this Act."

CIVIL.

1951.

Satyendra
Chandra Sen

v.

S. B. Trading
Co., Ltd.

Banerjee, J.

The "said Act" in the section is the West Bengal Premises Rent Control Act, 1950.

The facts of this case appear from the judgment of P. B. Mukharji J. in *S. B. Trading Co., Ltd. v. Satyendra Chandra Sen* (1). The plaintiff filed the suit for ejectment, arrears of rent and mesne profits. His allegation in the plaint was that the defendants (tenants) had failed to pay or deposit in accordance with the provisions of the Act of 1948 rent payable by them in respect of the premises in question which had accrued due after the commencement of the Act of 1948 and as such their interest in the premises was *ipso facto* determined and they should no longer be deemed to be tenants. According to the plaintiff the defendants were trespassers and liable to be ejected forthwith.

The defendants filed their written statement in which they denied that they had made any default in payment of rent which resulted in the determination of their interest in the premises. But ultimately they abandoned this defence and the only relief they claimed was under section 18(5) of the Act of 1950. The defendants expressly agreed that if their claim under that section failed, they would have no other defence to the suit and the judgment must go against them as a matter of course.

It will be convenient to set out here section 18(5) of the Act of 1950. It runs as follows:—

(1) (1950) 86 C.L.J. 46.

CIVIL.

1951.

Satyendra
Chandra Sen

v.

S. B. Trading
Co., Ltd.

Banerjee, J.

"If at the date when this Act comes into force, a suit for ejectment of a tenant is pending whether in trial court or first or second appeal in which no decree for ejectment would be passed except on the ground of default in payment of arrears of rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948, the court shall exercise the powers of granting relief against ejectment given by section 14 of this Act following the provisions and procedure of that section, as far as may be necessary, and for the said purpose shall make such order for amendment of pleadings, production of evidence, remand, payment of costs as may be necessary or just."

When the suit came up for hearing before P. B. Mukherji, J. he having regard to the views he expressed on section 18(5) in another case, held that the defendants were not tenants within the meaning of section 18(5) and as such were not entitled to the benefit of that section. But another learned Judge of this Court in construing section 18(1) of the Act of 1950 had taken a view which was in conflict with the view expressed by P. B. Mukherji, J. Having regard to this conflict of opinion, Mukherji, J. thought that the matter being of public importance should be heard by a Bench of this Court and accordingly this case was referred under Ch. 5 r. 3 Original Side Rules to my lord, the Chief Justice for constituting a Bench. A Bench was constituted and the case was heard and I delivered judgment in the suit *S. B. Trading Co., Ltd. v. Satyendra Chandra Sen* (1). We took the same view as was taken by P. B. Mukherji, J. and held that the defendants were not tenants within the meaning of section 18(5) and were not entitled to the benefit of the section. The net result of all this was that a decree was passed against the tenants on June 30, 1950. The tenants made an application to this court for leave to appeal to the Supreme Court of India from the decree and asked for stay of execution in the meantime.

This application was heard by the Chief Justice and J. P. Mitter on July 20, 1950. By an order made on that date, leave to appeal was granted. Execution of the decree was stayed, the tenants (through their counsel) undertaking 'to vacate the premises within fourteen days from the date of the appeal to the Supreme Court being dismissed by that Court, or being abandoned or not being prosecuted by the appellants'. The wording

(1) (1950) 86 C.L.J. 46 (61).

of the undertaking is not very happy, but there is no doubt in our mind, that the undertaking meant at least that if the tenants abandoned the appeal, they would vacate the premises within fourteen days thereafter. In this case there is no dispute that by December 18, 1950, the tenants abandoned the appeal and they have not vacated the premises. In the meantime, namely on November 30, 1950, the amending Act was passed from which I have already set out section 6 in an earlier part of this judgment.

CIVIL.
—
1951.
—
Satyendra
Chandra Sen
v.
S. B. Trading
Co., Ltd.
—
Banerjee, J.

The question arises as to whether the tenants are entitled to the benefit of section 6. We do not express any opinion as to when and under what conditions a tenant is entitled to the benefit under section 6. The only question we have considered in this application is whether in the circumstances of this case the tenants are entitled to the benefit, having regard to the undertaking they gave.

Mr. Ajit Dutt on behalf of the tenants has argued that they are entitled to the benefit in spite of the undertaking. He says that the statute has given to the tenants the benefit and they can claim it. He further said that the word "may" in the section should be read as "shall." On this point I set out an observation of Lord Reading from *Taylor v. Faïres* (1). In that case his Lordship was construing an analogous section (section 5 sub-section 3) which was enacted in the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. Section 5 sub-section 3 of that Act read as follows:—

"Where any order or judgment has been made or given before the passing of this Act, but not executed, and, in the opinion of the Court, the order or judgment would not have been made or given if this Act had been in force at the time when such order or judgment was made or given, the court may, on application by the tenant, rescind or vary such order or judgment in such manner as the court may think fit for the purpose of giving effect to this Act."

In construing the word "may" his Lordship observed as follows:—

(1) (1920) 124 Law Times 732.

CIVIL.

—

1951.

—

Satyendra
Chandra Sen

v.

S. B. Trading
Co., Ltd.

—

Banerjee, J.

"The question is, whether the power given to the County Court Judges by section 5 sub-section 3 of the Increase of Rent and Mortgage Interest (Restriction) Act 1920 is to be exercised as if the application which had been dealt with in May had been dealt with under the Act which came into force on the 2nd July. The question is whether parliament merely intended to give the County Court Judges a rigid power which he must exercise, if he is satisfied that the order would not have been made; or whether parliament intended to give him a discretion—the Judge being otherwise *functus officio*—to reopen the matter, if in the particular circumstances he thought fit to do so. That is the difference between the power to apply an Act of Parliament and an obligation to do so stated quite briefly, the real point that we have to decide is whether the word "may" in the sub-section must be read as "shall". Our attention has been called to a series of authorities on that question, but they do not really assist, because in every statute containing the word "may" in such a connection, the court must consider the general object and the subject-matter of the Act of parliament and the surrounding circumstances. "May" primarily means "may" although in some cases where parliament has used it the courts have interpreted it to mean "shall."

On looking at section 5, sub-section 3, and the general scheme of this legislation, I have come to the conclusion that in this case the word "may" means "may" and not "shall," and that the sub-section gives the County Court Judge a discretion with regard to the question of applying or not applying the provisions of the new Act."

A similar view was taken in this court in the case of *Manindra Nath Banerjee v. A. K. Fazlul Huq* (1) where the word "may" occurring in section 9B (3) of the Calcutta House Rent Control Order, 1943. was similarly construed. It may also be noted that in section 18(5) of the Act of 1950, the word is "shall." The court shall exercise the powers of granting relief. But in the section of the amending Act the word is may. The court may rescind or vary the decree. The legislature has made a difference in the two sections and I have no doubt that by using the word "may" it

(1) (1946) 51 C W.N. 148.

has conferred a discretion on the court in the matter rescinding or varying the decree. It never made it obligatory on the court to grant relief as has been contended for by Mr. Dutt.

Therefore, we cannot accept Mr. Dutt's contention that the word "may" in the section should be read as "shall." The word "may" means "may" and the court may or may not vary or rescind the decree as the circumstances may require. Being then a matter of discretion, the court will take into consideration all the facts and circumstances of the case before it makes an order under sub-section (6). The court should not make an order unless it is just and equitable to do so. Take the following illustration. A landlord gets an ejectment decree against a tenant and also an order directing the Sheriff to give possession, the Sheriff goes to the premises to give possession when the tenant implores the landlord to stay his hands saying that the tenant's son is so seriously ill that his removal from the premises at that moment might cost his life. In these circumstances, the landlord stays his hands and asks the Sheriff to give a fortnight's time to the tenant to vacate. Accordingly the time is given. In the meantime the Act is passed. The son gets well. Will the court permit the tenant to take shelter under sub-section (6)? It is clear that but for the clemency of the landlord, he would have got possession and the remedy which the tenant now claims would not have been available to him. I do not think in a case like this it would be just and equitable to make an order in favour of the tenant. The court should be just to the tenant. The court should be just to the landlord. If in a case like this, the Court cannot make an order giving relief to the tenant I do not see how in the case under consideration the court can make an order.

In this case the landlord after getting the decree was very anxious to get possession. The tenants after applying for leave to appeal to the Supreme Court asked for stay of execution. That application was strenuously resisted by the landlord. Mr. Asoke Sen appearing on behalf of the landlord was prepared to give an undertaking to court that if the decree was set aside in appeal, the landlord would restore to the tenant possession of the premises in question without any application being made by the tenants under section 144 of the Code of Civil Procedure. It was quite clear that the landlord was very anxious to get

CIVIL.

1951.

Satyendra
Chandra Sen
v.

S. B. Trading
Co., Ltd.

Banerjee, J.

CIVIL.

1951.

Satyendra
Chandra Sen
v.

S. B. Trading
Co., Ltd.

Banerjee, J.

possession if the undertaking by the tenants had not been given, there would have been no stay. No ground was made out for stay. Ordinarily therefore the landlord would have got possession by the time the new Act came into force.

Having gained a benefit by giving the undertaking, can the tenants now turn round and say that since in the meantime the amending Act has been passed they are entitled to take advantage of that Act? It seems to us that it would be very inequitable to allow the tenants to take advantage of such a situation for by giving the undertaking the tenants raised an expectation in the mind of the landlord that in any of the events, namely the appeal being dismissed by the Supreme Court or by the tenants not prosecuting or abandoning the appeal they would give up possession within fourteen days from the order. That being the assurance given by the tenants we do not think we should exercise a discretion in their favour. The expectation raised in the minds of the landlords must be fulfilled.

I have already held that section 6 confers a discretion on the Court and in exercising the discretion the Court must see that no injustice is done. Here to allow the tenants to take advantage of the situation would be to do a great injustice to the landlord, and ordinarily we should not allow the tenants to take the benefit under the section after having given that undertaking. It is not necessary for us to say what the position would have been if the appeal had been continued in the Supreme Court. All that we have considered in this application is whether the tenants after giving the undertaking can go back on it and ask for the benefit. Our answer must be in the negative.

We would therefore dismiss the application with costs. The respondents are entitled to the costs of this application and the costs of and incidental to the application for leave to appeal to the Supreme Court which resulted in the order of July 20, 1950.

Harries, C.J.:—I agree.

Mr. B. C. Chakravorty: Solicitor for the Applicants.

Messrs. N. C. Boral and Pyne: Solicitors for the Respondents.

S.K.R.C.

Application dismissed.

CIVIL REVISION.

Before Mr. Justice R. P. Mookerjee and Mr. Justice S. C. Lahiri.

THAKURDAS PUSHRAJ

v.

DWARKA PRASAD BAZAR AND ANOTHER.*

CIVIL.

1950.

January, 11.

Presidency Small Cause Courts Act (XV of 1882), Ch. VII, Sections 41 to 43, proceedings under.—Nature of jurisdiction of the Presidency Small Cause Court—Decision of such court under section 43—Not conclusive—May be challenged under sections 46, 47 or 49 of the Act—Section 19—Presidency Small Cause Court not entitled to try any suit for recovery of possession—Presidency Small Cause Court not entitled to entertain an application under section 11(3) of Act XXXVIII W. B. of 1948—Only remedy of the sub-tenant—To institute a regular suit for that purpose.

The jurisdiction of the Presidency Small Cause Court with regard to proceedings under sections 41 to 43 (Ch. VII of the Presidency Small Cause Courts Act) is of a summary character. Any decision given by the Presidency Small Cause Court, under section 43 is not conclusive and may be challenged under the provisions of sections 46, 47 or 49 of the Act.

By virtue of section 19 of the Presidency Small Cause Courts Act, the Presidency Small Cause Court is not entitled to determine any question of right to or interest in immovable property.

In view of the summary character of the jurisdiction of the Presidency Small Cause Court in proceedings under Ch. VII of the Act, the said court will have no jurisdiction to entertain an application under section 11(3) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948.

There is nothing in the West Bengal Premises Rent Control (Temporary Provisions) Act to show that the right created in favour of a sub-tenant by section 11(3) can be enforced by way of an application in a proceeding for possession instituted by the landlord against his tenant and in the absence of any such provision the only remedy of the sub-tenant is to enforce his right by a regular suit instituted for that purpose.

Application under section 115 C. P. Code by the Sub-tenant.

* Civil Revision Case No. 226 of 1949 against an order of the Presidency Small Cause Court Judge dated 18-12-48 refusing to entertain an application by the sub-tenant under section 11(3) of the West Bengal Act XXXVIII of 1948.

CIVIL.

1950.

Thakurdas Push-
praj
v.Dwarkan Prasad
Bazar

Original application by the Sub-tenant was under section 11(3) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948.

The material facts will appear from the judgment.

Mr. Chandidas Roy Chowdhury for the Petitioner.

Messrs. Bijon Behari Das Gupta and *Nikhil Ch. Talukdar* for the Opposite Party.

The judgments of the Court were as follows:—

January, 11.

S. C. Lahiri, J.:—This rule was obtained by a sub-tenant, and it is directed against an order of the Presidency Small Cause Court Judge by which he has refused to entertain an application filed by the sub-tenant under section 11(3) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 (West Bengal Act XXXVIII of 1948).

The facts which are relevant for the purpose of the present Rule are these. On December 3, 1948 the Opposite Party No. 1 got an order for possession against opposite party No. 2 in a proceeding under section 41 of the Presidency Small Cause Courts Act, and possession was ordered to be delivered, at first, on December 13, 1948 and subsequently time was extended to December 21, 1948. On December 15, 1948, the petitioner before us applied to the Small Court Judge under section 11(3) of the West Bengal Premises Rent Control (Temporary Provisions) Act, alleging that as the tenancy of opposite party No. 2 under opposite party No. 1 had been determined, the petitioner should be deemed to be a tenant in respect of the premises holding directly under the landlord. The Small Cause Court Judge refused to entertain the application on the ground that the declaration sought for by the petitioner could not be obtained by way of an application, but by a regular suit. Against this order, the present rule has been obtained.

On behalf of the petitioner, it has been argued that under section 48 of the Presidency Small Cause Courts Act, the Small Cause Court Judge is entitled to enter into this question in a proceeding under Chapter VII of that Act.

Now, the exact nature of a proceeding under Chapter VII of the Presidency Small Cause Courts Act has been considered in a recent decision in the case of *Amulya Ratan Bhattacharya v. Meghmala Dutt*, (1). In this decision, it has been pointed out that the jurisdiction of the Small Cause Court with regard to proceedings under sections 41 to 43 is of a summary character; and it has also been pointed out that any decision given by the Presidency Small Cause Court under section 43 is not conclusive, and may be challenged under the provisions of sections 46, 47 or 49 of the Act. It has further been pointed out that by virtue of section 19 of the Presidency Small Cause Courts Act, the Presidency Small Cause Court is not entitled to try any suit for recovery of possession. In view of the summary character of the jurisdiction of the Small Cause Court in proceedings under chapter VII of the Act, it seems to us that the Presidency Small Cause Court will have no jurisdiction to entertain an application under section 11(3) of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1948. Moreover, under clause (g) of section 19 of the Presidency Small Cause Courts Act, the Presidency Small Cause Court cannot determine any question of right to or interest in immovable property. The right which the petitioner seeks to enforce in the present proceeding is a right of statutory tenancy in the premises, and we think that the Presidency Small Cause Court has no jurisdiction to enter into that question.

In *Jatindra Mohan Das v. Kshitipati Nath Mitra*, (2) decided by Das and Chunder, JJ. on August 17, 1949, it was held:

"Section 11(3) of the Act has conferred some independent rights to a subtenant, provided his case is within that section to claim a statutory tenancy under the landlord under certain circumstances. But nowhere in this Act is there any provision which entitled such a sub-tenant to intervene in any proceedings between other parties, namely, the landlord and the tenant."

There is nothing in the West Bengal Premises Rent Control (Temporary Provisions) Act to show that the right created in

(1) (1949) 53 C.W.N. 474.

(2) (1949) Civ. Rev. Case No. 203 of 1949.

CIVIL.

1950.

Thakurdas Push-
praj

v.

Dwarka Prasad
Bazar

Lahiri, J.

CIVIL.

1950.

Thakurdas Push-
praj
v.
Dwarka Prasad
Bazar

Lahiri, J.

favour of a sub-tenant by section 11(3) can be enforced by way of an application in a proceeding for possession instituted by the landlord against his tenant and in the absence of any such provision, we think that the only remedy of the sub-tenant is to enforce his right, if any, by a regular suit instituted for that purpose.

For the reasons stated above, the decision of the Small Cause Court Judge must be affirmed and this Rule must be discharged. In the circumstances of the case, there will be no order as to costs in this Court.

If the plaintiff opposite party has not already obtained possession, he is to be put in possession under the terms of the original order passed on December 3, 1948, and a date is to be fixed by the Small Cause Court for giving possession to the plaintiff opposite party.

R. P. Mookerjee, J.:—I agree.

R.M.

Rule discharged.

CRIMINAL REFERENCE.

Before Mr. Justice K. C. Das Gupta and Mr. Justice
S. C. Lahiri.

Criminal

1950

, PURNASHASHI DEVI

May, 16.

v.

NAGENDRA NATH BHATTACHARJEE.*

*Maintenance, meaning of—Code of Criminal Procedure (Act V of 1898),
Section 488—Order for annual payment, bad in law—"Child," mean-
ing of.*

P. filed a complaint for maintenance for herself and her legitimate child against husband, N. The Magistrate of Asansol ordered payment of Rs. 60-8-0 per month and certain quantity of rice or its money equivalent per annum. The Sessions Judge on appeal held, (1) that the rate was high, (2) that the maintenance does not include education expenses, and (3) that the annual payment order was bad in law:

Held—(i) that maintenance means proper maintenance according to social position in life covering educational cost as and when necessary, (ii) that the order for annual payment was bad in law, (iii) that child means such sons and daughters as are unable to earn livelihood for themselves.

Criminal Reference by the Sessions Judge of Burdwan.

The complainant, Sm. Purnashashi Devi started this proceeding against her husband, Nagendra Nath Bhattacharjee, for maintenance for herself and her legitimate child.

The material facts will appear from the judgment.

Messrs. S. S. Mukherjee and Nalin Chandra Banerji for the Complainant 1st Party.

Mr. Arun Kumar Datta (No. 2) for the Opposite Party.

The judgments of the Court were as follows:—

* Criminal Reference No. 34 of 1950 by the Session Judge of Burdwan recommending an order of the Magistrate, Asansol, should be set aside.

Criminal
 1950
 Purnashashi Devi
 v.
 Nagendra Nath
 Bhattacharjee
 May, 16.

K. C. Das Gupta, J.:—This Reference was made by the Sessions Judge of Burdwan recommending that an order passed by the learned Magistrate, Asansol, directing payment of Rs. 60-8-0 per month and 11 Sali Bhati rice and 2 Sali of other variety of rice or its money equivalent per year to his wife Sm. Purnasashi Debi for her maintenance and the maintenance of his legitimate child by her should be set aside.

Three grounds have been put forward by the learned Judge for his recommendation. The first is that as the learned Magistrate was of the view that the maintenance had been paid but the rate was inadequate, it could not in law be said that the husband had neglected or refused to maintain his wife. In my judgment, this ground cannot prevail. When the law says "neglects or refuses to maintain"—it cannot but mean "neglects or refuses to maintain properly." Suppose one rupee was paid for the maintenance of a wife for a month. that would be paying some amount of maintenance, but it would be ridiculous to suggest that that is such maintenance which would stand in the way of the operation of section 488 of the Code of Criminal Procedure. In this case, the learned Magistrate found that the maintenance which had been given by the husband was inadequate. He had jurisdiction to pass proper order under section 488(1) of the Code of Criminal Procedure.

The second ground is that "maintenance" includes food, clothing and lodging and it does not include cost of education. Even if the costs of education were left out, it does not seem to me that the amount ordered by the learned Magistrate in this case could be considered to be too high. But I do not see why the cost of ordinary education should not in the case of a middle class family be considered to form part of maintenance. It may be that when the case of a person of the cultivator class is being considered any education more than primary education should not be considered to form part of maintenance, but the case of middle class families is different. I am unable to agree with the learned Judge that in no case can maintenance be thought to include anything more than food, clothing and lodging.

The third ground is that while section 488 of the Code of Criminal Procedure empowers the Magistrate to fix a monthly

allowance for the maintenance, the learned Magistrate had acted illegally in directing annual payment of the paddy. In my opinion the learned Judge was right in this criticism of the learned Magistrate's order. The operative portion of section 488 of the Code of Criminal Procedure is in these words:

" Order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding one hundred rupees in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs."

There is no provision for an order of payment of annual allowance, or any kind of annual payment.

It was contended by Mr. Dutt on behalf of the husband that as the son on whose behalf maintenance has been asked for is aged 17 or 18 or 19, he does not come within the meaning of "child" under section 488 of the Code of Criminal Procedure. If it was intended to limit the maintenance to sons or daughters upto a certain age, there seems no reason why the legislature did not make use of explicit words to give effect to that intention. It seems to me that the word "child" has been deliberately used to leave the courts free to order maintenance for such sons and daughters as are unable to earn livelihood for themselves, having due regard to their class or society to which they belong and other surrounding circumstances. The fact, therefore, that the son is 17 or 18 or 19 is, in my opinion, no ground for refusing maintenance on his account.

In this view of the matter, I would maintain the order passed by the learned Magistrate with this modification and that I would order payment of a lump sum of money per month instead of Rs. 60-8-0 per month and 11 Sali Bhati rice and 2 Sali of other variety of rice or its money equivalent per year as ordered by him. On consideration of all the circumstances, it seems to me that the proper order to make is that the petitioner must pay Rs. 90/- per month on account of the maintenance of his wife and child to his wife Sm. Purna Sashi Devi and I would order accordingly. This order will take effect from the date of the petition under section 488 of the Code of Criminal Procedure.

The reference is disposed of in these terms.

S. C. Lahiri, J.:—I agree.

R.M.

Reference partly accepted.

Criminal
—
1950
~
Purnashashi Devi
v.
Nagendra Nath
Bhattacharjee
—
Das Gupta, J.
—

CRIMINAL REVISION.

Before Mr. Justice K. C. Chunder.

Criminal

1950

August, 10.

A. C. DHAR

v.

DHANANJOY DAS
AND CORPORATION OF CALCUTTA.*

*Public Nuisance—Calcutta Municipal Act (Act III of 1923) section 535—
Abatement of nuisance—Corporation's duty to file applications—Petitioner's cost, if to be paid by the Corporation.*

In an application by the petitioner, under section 535 of the Calcutta Municipal Act for abatement of a public nuisance, the petitioner was successful, before the Municipal Magistrate, but spent money incidental to the proceeding out of his own pocket. The Opposite Party No. 2 filed a motion against the order of the Municipal Magistrate and obtained a Rule, which was finally disposed of. Thereafter the petitioner, prayed for recovery of legal expenses from the Corporation:

Held, under section 535 of the Municipal Act, it is the duty of the Corporation to file complaints on knowledge of public nuisance.

In every particular case the Municipal Magistrate should use his common sense to determine, whether it is fit, that the person, who on behalf of the public succeeds in having a duty done, which Corporation itself should have done, should get the costs or not.

Application by the Complainant.

The material facts will appear from the judgment.

Messrs. S. S. Mukherjee and Priti Bhushan Barman for the Petitioner.

Mr. Pashupati Ghosh, for the Opposite Party No. 1.

Mr. Sunil Kumar Bose, for the Opposite Party No. 2.

The following judgment was delivered by

* Criminal Revision Case No. 552 of 1950 against the order of Municipal Magistrate, Calcutta.

K. C. Chunder, J.:—This is a rule issued at the instance of one Mr. A. C. Dhar, a retired engineer. The opposite parties are the Corporation of Calcutta and one Dhananjoy Das, the owner of a bucket factory at 47/1/A, Shambazar Street, Calcutta. The petitioner has been fighting over this matter since 1946 and it is said that he is out of pocket by over Rs. 2,000/- in the public interest.

Criminal

1950

A. C. Dhar
v.

Dhananjoy Das

August, 10.

He complained of a public nuisance by the running of the bucket factory without proper precautions as to deadening of sound etc. in a crowded locality like Shambazar Street. After a good deal of opposition his application under Section 535 of the Calcutta Municipal Act for abatement of the nuisance was successful before the then Municipal Magistrate. It is to be noted that he filed an application under Section 535 of the aforesaid Act which should have been filed by the Calcutta Corporation. The Corporation did not take the proceedings out of his hands but he had to spend all the money himself even up to the stage of the present rule to get a public nuisance abated, a duty for which the Corporation realises rates from the rate-payers of Calcutta. The Corporation filed a motion against the order of the Municipal Magistrate which was passed on the 24th September, 1948 allowing the application under section 535 of the aforesaid Act and ordering abatement of the public nuisance. This is the way in which we are told the Corporation in the matter of abating a public nuisance helped the citizens of Calcutta. A rule was issued on this application of the Calcutta Corporation on the 10th December, 1948 by this Court and the rule was disposed of by Mr. Justice Sen on the 17th August, 1949 agreeing with the Magistrate that it was a public nuisance, that the nuisance must be abated, and his Lordship even suggested that, if necessary, the business should be stopped. He sent back the matter for further consideration of the steps to be taken to abate the nuisance. Even at this stage the Corporation of Calcutta did not take over the proceedings from the petitioner but all the expenditure had to be incurred by the petitioner out of his own pocket. It appears that a good deal of his time was wasted over futile proceedings in the Magistrate's court. Some supposed experts of the Corporation were examined as to how the nuisance was to be abated and it appears that the opinion of not one of them was accepted by the Magistrate. The Magis-

Criminal

1950

A. C. Dhar

v.

Dhananjoy Das.

Chunder, J.

trate then went on searching for an expert in Accoustics and fortunately did not succeed in further wasting either private citizens's money or public money in any examination of such an expert as no such expert was found employed by the Government of West Bengal. Finally, the Magistrate decided that he should visit the locality himself and after his own inspection decided how the nuisance should be abated. He made such an inspection after notice to the parties and he has ordered various things to be done by the Corporation at the cost of Dhananjoy Das, Opposite Party No. 1, in order to abate the nuisance.

Mr. Mukherji's first contention was that all these directions given by the Magistrate will not perhaps be likely to abate the nuisance. It is rather too early now to say whether the Magistrate's directions would lead to successful result or will fail. It is desirable that when the Magistrate after taking so much pains as to inspect the place has passed an order the order should be given a chance of being successfully carried out. Therefore we uphold the order of the Magistrate with this reservation that should either the Corporation or the petitioner find that the nuisance has not completely abated, liberty is reserved to the petitioner or the Corporation for further action under Section 535 of the Calcutta Municipal Act and the action already taken will be no bar to any such further proceedings.

The petitioner prayed to the Magistrate as he was successful for an order that his costs were to be paid by the Calcutta Corporation under Section 535 of the aforesaid Act. It appears that there was vehement opposition by the Corporation to this. The Magistrate proceeded to discuss whether this is a case in which the words "should the Magistrate think fit to do so" apply or not and he discussed the general principle of such fitness and has said everything except what is really relevant, viz., that in every particular case the Magistrate should use his common sense to determine whether it is fit that the person who on behalf of the public succeeds in having a duty done which the Corporation should have itself performed should get the costs or not. In the present case there can be absolutely no dispute that the successful petitioner should be paid all his costs by the Corporation. Mr. Basu appearing on behalf of the Calcutta Corporation has drawn our attention to various steps which the Corporation has hitherto

Criminal.
1950.

A. C. Dhar.

v.

Dhananjoy Das.

Chunder, J.

taken under other different sections which certainly did not succeed in producing any abatement of the nuisance at all. When proceedings producing greater success were taken by the petitioner it is desirable that the Corporation should pay for at least the knowledge that they have now acquired as to how to tackle matters of like nature successfully. We have utterly failed to appreciate the long discussion the Magistrate has entered into in his judgment to deprive the successful and public-spirited petitioner of the costs which he had incurred for doing a public duty.

The order therefore is that the costs of the petitioner are to be paid by the Corporation of Calcutta and the Magistrate will check his bill for costs and whatever amount is proved to have been actually spent either in lawyer's fees or for witnesses etc., is to be allowed to him as such costs. The costs so allowed by the Magistrate will be payable by the Corporation of Calcutta under Section 535 of the Calcutta Municipal Act.

R.M.

Rule made absolute.

APPELLATE CIVIL.

Before Mr. Justice Rama Prosad Mookerjee.

CIVIL.

PROTAP CHANDRA KOYAL.

1951.

v.

January, 29.

KALI CHARAN ACHARYA AND ANOTHER.*

Specific performance of a Contract of reconveyance of land—Time, if to be considered as the essence of the Contract—Post as the medium of communication—Payment of consideration, not essential at the time of the exercise of the option.

On 23rd April, 1937, P. executed in favour of D1 a conveyance in respect of the property in suit for a consideration of Rs. 300/-. On the same date an agreement was executed as between the parties under which D1 agreed to reconvey the self-same property in favour of P. It was stipulated that if Rs. 316 be paid in one instalment within the month of Chaitra before the expiry of the Bengali year 1348, the contract would be specifically enforced. Question arose, if in the present case, time was the essence of the contract. P. expressed the intention of reconveyance by a letter which though posted before the expiry of the stipulated time was actually received by D1 after the expiry of the stipulated time and without accompaniment of the consideration money:

Held—(1) That the doctrine that time may not be the essence of the contract which arises on the construction of contracts for sale of immovable property, is not applicable to contracts for resale of property so conveyed.

(2) That when the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usage of mankind, the post might be used as a means of communicating the acceptance of an offer, the contract would be completed on posting of the letter of acceptance.

(3) That the exercise of the option in the present case is effective from the date when the letter is posted and not from the date when the letter is received.

(4) That the consideration is payable ordinarily only when the con-

* Appeal from Appellate Decree No. 2023 of 1947 against the decree of J. P. Mookherjee, Esq. Subordinate Judge, Second Additional Court of Zilla 24 Parganas at Alipore in Title Appeal No. 435 of 1946 dated the 26th of March 1947, affirming the decree of H. Ganguly, Esq. Munsif, 1st Court Alipore dated the 29th June, 1946.

veyance is executed or at the time when it is registered, if it is compulsorily registrable.

Cases followed and referred to:—

Samapuri Chettiar v. Sudarsan Chariar (1); *Joy v. Brich* (2); *Dibbins v. Dibbins* (3); *Henthorn v. Fraser* (4); *Bruner v. Moore* (5); *Dunlop v. Higgins* (6); *Nicholson v. Smith* (7).

Appeal by the Plaintiff.

Suit for specific performance of a contract of reconveyance in respect of the property described in the plaint.

The material facts will appear from the judgment.

Messrs. Abinash Chandra Ghosh and Chandidas Roy Chowdhury for the Appellant.

Messrs. Apurba Charan Mukherjee and Kshetra Mohan Chatterjee for the Respondent No. 1.

Mr. Provash Chandra Basu for the Respondent No. 2.

The judgment of the Court was as follows:—

R. P. Mookerjee, J.—This is a plaintiff's appeal and arises out of a suit for specific performance of a contract of reconveyance in respect of the property described in the plaint.

January, 29.

On the 23rd April 1937, the plaintiff executed in favour of the defendant No. 1 a conveyance in respect of the property in suit for a consideration of Rs. 300/-. On the same date an agreement was executed as between the parties under which defendant No. 1 agreed to reconvey the self same property in favour of the plaintiff. It was stipulated that if Rs. 316 be paid in one instalment within the month of Chaitra before the expiry of the Bengali year 1348, the contract would be specifically enforced.

- (1) (1919) I.L.R. 42 Mad. 802.
- (2) (1836) 7 E.R. 22; 10 Bligh. N.S. 201.
- (3) [1896] 2 Ch. 348.
- (4) [1892] 2 Ch. 27 (32).
- (5) [1904] 1 Ch. 305, 305.
- (6) (1848) 1 H.L.C. 381.
- (7) (1882) 22 Ch. D. 640.

Civil.

1951.

Protap Chandra

Koyal.

v.

Kali Charan

Acharya.

CIVIL.

1951.

Protap Chandra

Koyal.

v.

Kali Charan

Acharya.

Mookerjee, J

The plaintiff came to court with the story that he had offered to make the payment on the 7th Falgoon 1348 B.S. but that the defendant had refused to accept the same. On the 9th April following *i.e.* before the end of Chaitra 1348 B.S. the plaintiff served a registered letter upon defendant No. 1 through a lawyer, but inspite of the same defendant No. 1 had failed and neglected to receive the amount or to execute the deed of reconveyance. During the cadastral survey operations, defendant No. 2 is alleged to have wrongly and fraudulently got himself recorded as an under raiyat under defendant No. 1. The plaintiff claims that he is entitled to get reconveyance from defendant No. 1 of the property in suit in the same condition as it was when it was sold to defendant No. 1 and the agreement was executed.

Separate defence were filed by the two defendants. Defendant No. 2 contends that he was the tenant in respect of the property in suit from a date even before the plaintiff had sold the land in suit to defendant No. 1. He claims to be a bonafide tenant at least from 1932. Defendant No. 1 contests the plaintiff's claim for specific performance on the ground that there was no tender of money to him within the stipulated date and as time was the essence of the contract the plaintiff is not entitled to get any reconveyance. It is further contended that the plaintiff was not either ready or capable of fulfilling the conditions imposed under the contract. The tenancy right as claimed by Defendant No. 2 is supported by the Defendant No. 1.

The learned Munsif dismissed the plaintiff's suit on a finding that there was no sufficient tender to Defendant No. 1 and that time was the essence of the contract and that no payment had been made within the stipulated time.

On appeal by the plaintiff this decision has been affirmed by the learned Subordinate Judge.

On behalf of the appellant it is contended in the first place that on a proper interpretation of the contract it ought to have been held that time was not the essence of the contract. Secondly even on the finding that the verbal tender, alleged by the plaintiff as having been made on the 7th Falgoon 1348 B.S.

had not been proved, it ought to have been held that the pleader's letter sent to Defendant No. 1 on the 9th April, 1942, was sufficient in law.

CIVIL.

1951.

Protap Chandra

Koyal.

v.

Kali Charan

Acharya

Mookerjee, J.

In support of the first point reference may be made to the terms contained in the deed of agreement, dated the 23rd April 1937, which provided, *inter alia*, that if the entire amount, namely Rs. 316 were paid in any year in one instalment before the end of the year 1348 B.S. the defendant would be bound to give up possession of the land in suit. If the defendant does not readily give up possession the plaintiff would be entitled to file a suit in a competent court, deposit the amount in question and get a conveyance executed. It is further proved that if within the due date mentioned namely the end of Chaitra 1348 B.S. the amount in question be not paid, the defendant would not be bound to give up possession of the land and all the rights created under the agreement would come to an end.

If there be no legal bar to time being the essence of the contract in the case of a contract for reconveyance, there are clear indications in the terms contained in the agreement which unmistakably show that the parties intended that if the plaintiff did not take active steps in pursuance of the agreement before the end of Chaitra 1348 B.S. the rights which had been created under the agreement in favour of the plaintiff would come to an end.

On behalf of the respondents, reliance was placed upon the decision in the case of *Samapuri Chettiar v. Sudarsan Chariar*, (1) in support of the proposition that the doctrine that time may not be the essence of the contract which arises on the construction of contracts for sale of immovable property is not applicable to contracts for resale of property conveyed. This proposition is supported by *Joy v. Birch* (2); and *Dibbins v. Dibbins* (3). There is no reason why the principle should not be accepted as applicable on the facts of the present case. It has therefore to be held that time was the essence of the contract in the present case.

(1) (1919) I.L.R. 42 Mad. 802.

(2) (1836) 7 E.R. 22; 10 Bligh. N.S. 201.

(3) [1896] 2 Ch. 348.

CIVIL.

—
1951.

Protap Chandra

Koyal.

v.

Kali Charan

Acharya.

—
Mookerjee, J.

In view of the present state of the law, there is no room for argument that the transaction between the parties as affected on the 23rd April 1937, was not in the nature of a mortgage.

The next question which arises for consideration is whether the plaintiff had within the time stipulated exercised his rights as required under the contract. It has been found by the Court of appeal below that the alleged offer in Falgoon 1348 B.S. having been made by the plaintiff to the defendant and refused by the latter had not been proved. It has however been found that the letter sent by the plaintiff's lawyer on the 9th April 1942, was actually received by the defendant. The learned Subordinate Judge held that the receipt of the letter on the 18th April 1942, was not a sufficient compliance with the terms of the contract, as the date on which it was received was after the expiry of the month of Chaitra.

Mr. Mukherjee on behalf of the defendant respondents contends that the legal effect of the letter in question is to be considered with reference to the date when it was received by Defendant No. 1. It may however now be taken as settled law that unless the offerer expressly or impliedly directs to the contrary an acceptance by letter is admissible. Lord Harschell in the case of *Henthorn v. Fraser*, (1) observed. "Where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usage of mankind the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted."

As pointed out by Lord Harschell, the effective date on which the option of acceptance is exercised by a party is to be ascertained from the date when the acceptance is put in transmission and the letter is posted. Mr. Mukherjee, however contends that the contract in question in the present suit did not envisage acceptance by post. The provision is that the payment is to be made by the plaintiff to the defendant. Had there been any specific provision in this contract that payment is to be made to the defendant personally and that sending the intimation of the acceptance of the offer was not to be effected through

(1) [1892] 2 Ch. 27 (32).

(2) [1904] 1 Ch. 305.

post, only then could it have been contended that the posting of the letter of acceptance was not effectual. We shall consider later on as to the legal implication of the other alternative provided in the contract when payment is not received by the defendant within the due date. The observations by Lord Harschell, referred to above, were considered by Farewell J. in the case of *Bruner v. Moore*, (2). In this case, however, the court went further and came to the conclusion that the circumstances showed that the parties must have contemplated that the post might be used as a means of communicating all steps connected with the contract. In the present case, we cannot say that the circumstances contemplated by the parties at the time when the contract was executed was that the post might be used as a means of communication. But as observed in the case of *Henthorn v. Fraser*, (1), the earlier decision in the case of *Dunlop v. Higgins* (2), cannot be interpreted to mean that an implied authority to send the acceptance by post must be proved before the court can accept the contention that on posting of the acceptance the contract was completed. There is a fundamental difference between the circumstances where the date from which an offer is effective and when a withdrawal of an offer comes into operation. As was pointed out in the case of *Henthorn v. Fraser* (1), as also in the case *Bruner v. Moore* (3), in the case of an acceptance of an offer the test to be applied is, somewhat different.

In the present case that letter sent by the lawyer on behalf of the plaintiff on the 9th April, 1942, was in the nature of an acceptance of an offer or exercise of an option which had been made by the agreement some years before. Intimation that the plaintiff was exercising the right which was created in his favour by the contract was conveyed by the pleader's letter dated the 9th April, 1942, and on the authorities above mentioned it must be held that exercise of the option was effective from the date when it was posted which was before the end of Chaitra 1348 B.S., and not from the date when the letter was received by the defendant after the expiry of the month of Chaitra 1348 B.S.

Mr. Mukherjee on behalf of the respondents, however, contends that even if the letter be deemed to be effective from

(1) [1892] 2 Ch. 27.

(2) (1848) 1 H.L.C. 381.

(3) [1904] 1 Ch. 395.

CIVIL.

1951.

Protap Chandra

Koyal.

v.

Kali Charan

Acharya.

Mookerjee, J.

Civil.
 ———
 1951.
 ———
 Protap Chandra
 Koyal.
 v.
 Kali Charan
 Acharya.
 ———
 Mookerjee, J.

the date when it was posted, the plaintiff is not entitled to the relief prayed for, as he was required to deposit the amount along with the filing of the plaint, or in any view immediately thereafter when the other alternative provided in the contract was availed of by him. The contract between the parties was to this effect that within a particular date the plaintiff must exercise his option and that he must be ready to pay the amount which he was required to do. If on such offer the defendant did not make over possession, or execute the conveyance, the plaintiff would be entitled to get a conveyance executed on depositing the amount in the competent court. In the case of a conveyance, the consideration is payable ordinarily only when it is executed, or at the time when it is registered, if it is compulsorily registrable. The terms contained in this agreement are liable to the interpretation as put by Mr. Mukherjee that the amount is to be deposited in Court. Is that deposit to be made along with the filing of the plaint, or is it to be done before the conveyance is actually executed?

Reference may in this connection be made to the case of *Nicholson v. Smith* (1). In that case a lease of household property was granted in the year 1818 to the trustees of an Insurance Company for 21 years at a rent of £100/- with a covenant that the lessor and his assignees would from time to time and at any time before the expiration of the term and also before the expiration of every succeeding term to be granted by every future or renewed lease, whenever required by the lessees or the persons interested in the term or in the succeeding terms and upon payment of a premium of one thousand pounds, grant a renewed lease for 21 years. In every such renewed lease, there would be a similar covenant for renewal at or before the end of every 21 years, subject to such conditions for renewal as in the original lease. There had been two renewals in 1839 and 1860. This lease was due to expire on the 24th June 1881. On the 23rd June, the persons holding the interest of the original lessor gave notice to the Secretary of the trustees who were interested in the leasehold property that the lease would expire on the following day. The latter answered immediately that the Directors of the Company would of course renew the lease. The renewal was subsequently refused and one of the grounds on which such refusal of renewal

(1) (1882) 22 Ch. D. 640.

CIVIL.

1951.

Protap Chandra
Koyal.v.
Kali Charan
Acharya.

Mookerjee, J.

had been made was that the premium which was required to be paid had not been offered and in any view such payment had not been made when the suit for specific performance was filed by the representatives of the lessee. The court held that it was not necessary for the lessees to pay the premium of one thousand pounds, or to execute a new lease before the expiration of the term, but that it was necessary that notice of an intention to renew should be given before the end of the term. The intimation sent by the Secretary to the Trustees was deemed to be sufficient in law. The court in spite of specific provision in the agreement held that the trustees of the fund were entitled to a renewal of this lease on £1,000/- being paid on the execution of the lease and the lessor was entitled to the interest from the date of the renewal to the date of payment.

In the present case also there is no specific provision in the agreement that the payment is to be made along with the filing of the plaint. The purchaser is to make payment when the conveyance is executed and the clause in the agreement specifically provides that the conveyance would be executed through the court only on the amount being deposited. Such amount being deposited will entitle the plaintiff to a conveyance being executed and as I have stated already, the plaintiff must also be ready to pay the interest on the amount from the date when such payment became due to the date of payment.

This appeal accordingly succeeds, the judgments and decrees of the Courts below are set aside and the plaintiffs suit is decreed against Defendant No. 1.

The plaintiff must deposit Rs. 316/- in the trial court within four weeks from this date together with interest at six per cent per annum from 1st Baisakh, 1349 B.S., upto the date of deposit to the credit of Defendant No. 1. The plaintiff must also deposit in the trial court the requisite amount for purchasing stamp papers for the execution of the conveyance on the basis of Rs. 316/- being the consideration for the conveyance. The plaintiff will bear other incidental costs when the conveyance is executed by Defendant No. 1.

CIVIL.

—

1951.

Protap Chandra

Koyal.

v.

Kali Charan

Acharya.

—

Mookerjee, J.

On such deposit of Rs. 316/- with interest as directed above being made, Defendant No. 1 is to execute a conveyance in favour of the plaintiff within four weeks of such deposit.

If the conveyance is not executed by Defendant No. 1, within the date above mentioned, it will be open to the plaintiff to have a conveyance executed by the court at the cost of the plaintiff and to have it registered.

If the deposit is not made within the date mentioned this suit will stand dismissed with costs.

If the deposit of Rs. 316/- with interest as directed above is made by the plaintiff within the date fixed above the plaintiff will be entitled to the costs of the trial court.

If the deposit is not made by the plaintiff, defendant No. 1 will be entitled to the costs of the trial court, as also of this court.

So far as Defendant No. 2 is concerned, the trial court had dismissed the plaintiff's claim against Defendant No. 2, on the finding that Defendant No. 2 had been on the land as a tenant from before the agreement. The claim against Defendant No. 2 will stand dismissed in this court. There will be no order for costs so far as Defendant No. 2 is concerned.

R.M.

Appeal allowed.

ORIGINAL CIVIL.

Before Mr. Justice H. K. Bose.

SOORAJMULL NAGARMULL

v.

CIVIL.

1951.

February, 16.

THE ASSISTANT COLLECTOR OF CUSTOMS AND OTHERS.*

Constitution of India, Art. 226—Writs of mandamus, prohibition and certiorari—Sea Customs Act (VIII of 1878) Sections 182 to 184, 198—“Adjudicate” in Section 182 of the Sea Customs Act, meaning of—Principles of natural justice—Alternative remedy whether bars issue of a writ of certiorari—Court, if has jurisdiction to prevent enforcement of a bond or contract executed by the petitioner by writ of mandamus or certiorari—Section 198 of Sea Customs Act, when and under what circumstances a bar to a proceeding—Whether prerogative writs are “proceedings” within the meaning of the Section 198 of the Sea Customs Act.

Held:—(a) It is the duty of the Customs Authority to “adjudge” (i.e. decree judicially) the penalty (Sections 182 to 184). In other words the duty is to act judicially and/or quasi judicially.

(b) The fundamental rules of judicial procedure or the principles of natural justice require that proper hearing and opportunity should be given to a person before his rights are affected by any decision or adjudication.

(c) The Customs Authorities are no doubt masters of their own procedure; but they should observe the fundamental principles of natural justice. It is not required that they should follow the strict rules of Judicial Procedure; but they are undoubtedly under a duty to act according to the accepted principles of natural justice.

(d) In this case there has been a denial of natural justice and violation of the fundamental principles of judicial procedure and hence a writ of certiorari would lie, even though there may be an alternative remedy open to the petitioner by way of an appeal under the provisions of the Sea Customs Act or by way of right of action under the general law.

(e) There can be no doubt that the decision whether a liability has arisen to produce a licence or whether a bond has become enforceable, involves an adjudication. In other words such decision judicial or quasi

* Matter No. 113 of 1950. Application under Art. 226 of the Constitution and under Clauses 4 and 21 of the Charter for writs in the nature of Mandamus, Prohibition and Certiorari and also under section 45 of the Specific Relief Act for other reliefs.

CIVIL.

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

judicial acts and as the entire proceedings are vitiated by reason of failure to observe the principles of natural justice, such decision also can be quashed by a writ of *certiorari*.

(f) If a person acts arbitrarily or in violation of the principles of natural justice or on the basis of extraneous or irrelevant considerations he cannot be said to be "purporting to act in pursuance of the Act." A person cannot disregard or ignore the provisions of the Statute and at the same time maintain that he is purporting to act in pursuance of that statute. In the circumstances non-compliance with the requirements of Section 198 of the Sea Customs Act cannot operate as a bar to the present proceedings.

(g) An application for the issue of a prerogative writ is a "proceeding" within the meaning of Section 198 of the Sea Customs Act.

(h) Section 198 of the Sea Customs Act only imposes a bar or disability on the person who seeks to take proceedings in a Court of law but does not fetter or restrict the power of the Court or affect the jurisdiction of the High Court in any way. If, however, it tends to affect the power of the High Court it would be void to that extent.

(i) It is well established that in order that the power of any Court to issue a writ of *certiorari* can be taken away by any statute there must be express negative words to take away the power.

Application by Soorajmull Nagarmull under Article 226 of the Constitution and under Clauses 4 and 21 of the Charter for writs in the nature of Mandamus, Prohibition and Certiorari and also under section 45 of the Specific Relief Act claiming certain reliefs.

The material facts appear from the judgment.

Mr. S. M. Bose (*Advocate General*) with Mr. B. Das for the Applicant.

Mr. H. N. Sanyal with Mr. E. R. Meyer for the Respondents.

The judgment of the Court was as follows:—

February, 16.

H. K. Bose, J.:—This is an application under Article 226 of the Constitution and under Clauses 4 and 21 of the Charter for Writs in the nature of Mandamus, Prohibition and Certiorari and also under section 45 of the Specific Relief Act for a direction on the Respondents prohibiting them from exercising jurisdiction

to call upon the production of an import licence other than the licence already produced and from taking steps in enforcing the bond dated the 28th of March 1950 or from recovering a sum of Rs. 4,65,473/12/- and also for a direction for withdrawal of the illegal demand and for refund of a sum of Rs. 75,925/14/- illegally realised by way of extra duty and for certain other directions.

CIVIL
—
1951.
Soorajmull
Nagarmull
v.
The Assistant
Collector of
Customs.

—
Bose, J.

On the 30th December 1949 the petitioner bought from Toona Petroleum Co. of Philadelphia, U.S.A. 7215 drums of pale spindle oil which is a lubricating oil and is used for lubrication alone. The said drums were imported into India by the petitioner under two invoices both dated the 30th September 1949 one for 6500 drums and the other for 715 drums. Both the said invoices described the goods thereby covered as 'spindle oil' for lubrication not being a white spindle oil or a technically white or a white mineral with flash point open 200 °F. minimum.

The said oil was imported under Import licence No. 0888842/48/CCI dated the 23rd June 1949 permitting import of lubricating oil excluding white spindle, technically White and White Mineral oil from the United States of America. The goods arrived at the Port of Calcutta on the 6th of March 1950. The petitioner states that the said oil is 'Lubricating oil' within the meaning of item 27(8) of the First Schedule to the Tariff Act 1934, i.e. oil such as not ordinarily used for other purposes than lubrication. According to item 27(8) the rate of import duty is Rs. 0/2/6 per Imperial Gallon. It is stated in the petition that the invoices, cables and correspondence and other papers relating to the purchase of the said goods bear out the fact that the oil that was purchased was 65/75 pale spindle oil whose open flash point was about 270°F., and it was neither White Spindle oil nor technically White Oil nor White Mineral Oil. It is further stated that it would appear from the letter of the Central Board of Revenue, New Delhi, to the Indian Chamber of Commerce, Calcutta, that according to the Board 'Spindle oil' is assessable to duty under item 27(8) of the Indian Customs Tariff as 'Lubricating oil' and if duty is imposed under any other Tariff item that item 27(8) since November 1948 such duty would be refundable to the persons entitled to such refund.

CIVIL.

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

Bose, J.

After the arrival of the goods on or about 6th March 1950 a Bill of Entry was submitted and a sum of Rs. 49,752/1/- was calculated at the rate of Rs. 0/2/6 per Imperial Gallon under item 27(8) as the duty payable for such goods and the said sum was paid to the Customs Authorities. The Customs Authorities however insisted on and did take a guarantee or bond in writing from the petitioner on the representation that on such bond being executed the said goods would be released to the petitioner immediately samples had been taken. But although such samples were taken on the 8th of March 1950 the goods were not released till 30th March 1950. On the 16th March, 1950, the Respondent No. 1 the Assistant Collector of Customs informed the petitioner that on chemical test of samples drawn from the consignments the goods have been found to be classifiable as 'Mineral oil' under item No. 27(3) of the Indian Customs Tariff which provides that "All sorts of Mineral oils not otherwise specified shall be assessed to duty at 27% Ad valorem." The petitioner was called upon by the said Memorandum to show cause as to why the goods should not be confiscated and penalty imposed on the petitioner under section 167 clauses (8) and (37) of the Sea Customs Act and the petitioner was further directed to submit full correspondence and evidence in support of its explanation. On the 23rd of March 1950 the Bill of Entry was corrected by the Customs Authorities and the figure of Rs. 49,752/- was struck out and was substituted by the figure of Rs. 1,25,677/15/-. The petitioner charges that the alteration was made capriciously mala-fide and without any or proper evidence and in the absence of the petitioner and without giving the petitioner any opportunity to be heard. It is submitted in the petition that the Customs Authorities are under a duty to act judicially or quasi judicially in matters of assessment and it is incumbent on them to act in conformity with the fundamental principles of judicial procedure and of natural justice in making decisions and passing the orders. But the orders passed or actions taken against the petitioner are contrary to the principles of natural justice. On the 30th of March 1950 the petitioner paid the excess duty of Rs. 75,925/- and the petitioner also had to execute a bond along with the general Assurance Society Ltd. dated the 28th of March 1950. The petitioner repeatedly asked for refund of the extra duty of Rs. 75,925/14/- but no refund was made. The petitioner also asked for a certified copy of the test report but on the 22nd of

May 1950 the petitioner was informed that testing of samples had not yet been finalised and the matter of granting a certified copy of the test report would be considered after a final decision was arrived at. In fact, however, no certified copy of test report was at any time sent to the petitioner. On the 20th November 1950 the petitioner received a Notice dated the 17th November 1950 purporting to be an order of the Collector of Customs the Respondent No. 2 demanding payment of Rs. 4.65,473/12/- in the first instance within fourteen days. It is stated in the petition that this order was passed without any justification and without giving the petitioner any opportunity to be heard and there was no adjudication within the meaning of the Sea Customs Act. It is pointed out that this demand was also contrary to the principles of natural justice and in violation of the fundamental principles of judicial procedure. It is further stated in the petition that by reason of the stray orders and demands of the Customs Authorities the petitioner's fundamental rights to hold property and to carry on its trade or business has been illegally hampered and its personal rights and its property and its business have been injured. In the circumstances the petitioner has moved this Court for the reliefs stated above.

The Survey Report dated 3rd January 1950 of Charles Martin & Company of Philadelphia, U.S.A. describes and analyses the goods as 65/75 Spindle oil for lubricating purposes not being white Spindle technical white or white mineral oil or average Flash open cup 250°F minimum.

The analysis of R. V. Briggs & Co., Ltd., of the samples drawn by Norman Stewart & Co., describes the goods as Spindle Oil of Flash point Clavaland open cup 262°F, 250°F and 255°F respectively but it contains the remarks that although the sample complies with U. S. Specification it fails to comply with I. S. D. specification G/o-101/1 for Extra light Spindle oil as the Flash point is too low, and it is not suitable for burning the wick lamps.

The telegrams and correspondence between the petitioner and the Toona Petroleum Company also describe the goods as 65/75 Spindle oil.

CIVIL.

1951.

Soorajmull
Nagaimull

v.

The Assistant
Collector of
Customs.

Bose, J.

CIVIL

1951.

Sooirajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

Bose, J.

Mr. Ernest Joseph Brauleux who signed the certificates of Examination carried out by R. V. Briggs & Co., Ltd., has sworn an affidavit dated 6th September 1950, stating that the examination was carried out under his supervision and he testifies to its being correctly done. He also states that one of apparatus at the Customs House, Calcutta, was found by him to be defective, and it yielded results which had to be discarded.

The affidavit of James Paterson, partner of Norman Steward & Co. relates how the samples were collected from the consignment.

The affidavit of Asok Ratan Mazumdar a qualified chemist describes the commodity as lubricating oil.

The Government Test House Certificates at Alipore describes the open Flash points of the different samples as ranging between 270°F and 290°F and remarks that all the samples conform to the specification for 65/75 Spindle Oil for lubricating purposes, and bruning tests carried out on one of the samples show that it is not quite suitable as an illuminant.

The certificate points out that D.G. I. & S. Specification No. G/o-101/1 for oil spindle extra light, stipulates however a minimum closed flash point of 150°C (302°F) which is considerably higher than the Flash points of the samples as indicated by their open flash points of 270-290°F.

It is submitted by the learned Advocate General who appears for the petitioner that the Government Specification G/o-101/1 is for the guidance and regulation of Government transactions in spindle oil. The same cannot be adopted as the standard for classifying goods according to the Customs Tariff classification standard for purposes of assessment of duty on goods imported by private traders. The goods imported by private traders has to be classified and assessed to duty according to the description of the goods in various items of the Indian Tariff Act.

According to Item 27(8) all kinds of lubricating oil excluding any mineral oil which has its flashing point below two hundred

degrees of the Farenheits' thermometer by Abels' close that are assessable at the rate specified against that item. According to the Advocate General this item should apply to the goods in question. I think there is considerable force in this contention. The Customs Authorities are to act in accordance with the classification in the Tariff Act. The Government standard laid down for guidance of its own transactions cannot over ride the provisions or clarifications laid down in the Statute. It is clear that the decisions of the Customs Authorities have been actuated by extraneous and irrelevant consideration and they have already exceeded their jurisdiction. See *Rex v. Board of Education* (1). Farwell L. J. observed as follows (p. 179):—

“If the tribunal has exercised the discretion entrusted to it bonafide, not influenced by extraneous or irrelevant considerations and not arbitrarily or illegally, the Courts cannot interfere; they are not a court of appeal from the tribunal, but they have power to prevent the intentional usurpation or mistaken assumption of a jurisdiction beyond that given to the tribunal by law, and also the refusal of their true jurisdiction by the adoption of extraneous considerations in arriving at their conclusion or deciding a point other than that brought before them, in which cases the Courts have regarded them as declining jurisdiction. Such tribunal is not an autocrat free to act as it pleases but is an inferior tribunal subject to the jurisdiction which the Court of King's Bench for centuries and the High Courts since the Judicature Acts has exercised over such tribunals.”

On behalf of the Respondents Mr. Vasani the Assistant Collector of Customs has affirmed an affidavit.

He states that the oil in question is not a lubricating oil. According to the test carried out by the Chief Chemist, Central Revenues, New Delhi the oil has the Flash point of 210°F and is unsuitable for use as an illuminant in wick lamps, and it does not conform to official specification (I. S. D. No. G/0-101/1-3 and R. I. A. S. C. No. 176 and 177) of Spindle oil which prescribes minimum flash point of 105°C (302°F) by the Pensky-Martens Closed Tester and as such cannot be classified as Spindle oil but it would appear to be classifiable as a Diesel oil.

(1) [1910] 2 K.B. 165 (179).

CIVIL.
—
1951.
Soorajmull
Nagarmull
v.
The Assistant
Collector of
Customs.
—
Bose, J.

CIVIL:

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs:

Bose, J.

Further on examination at the Chemical examiner's department, Calcutta, the oil was found to have a strong Kerosene smell and as the distillation range was found to be up to 300°C (15%) and up to 350°C (42%), the oil could not be considered as a lubricating oil.

It may be noted that the case of the oil having strong Kerosene smell is not to be found in any of the correspondence of the Customs authorities but is made for the first time in the affidavit in opposition.

Mr. B. D. Mukherjee, the Appraiser of the Customs House and certain other importers in the Calcutta market are alleged to have expressed certain opinions but no affidavits are forth coming from such persons, or from Mr. H. L. Suri, the Chemical Examiner who also expresses the opinion that the oil is not spindle oil.

Mr. Vasani further states in his affidavit that by letters dated the 8th March 1950, 23rd March 1950 and by the Guarantees dated the 28th March 1950 the petitioner undertook to pay extra duty or penalty if imposed and undertook to produce documents showing the use of oil as lubricating oil within three months. The petitioner however failed to produce any such documents.

It is also pointed out in Mr. Vasani's affidavit that by the Memorandum issued by the Customs Authorities on the 16th March 1950 the petitioner was called upon to show cause and to produce evidence but no satisfactory cause was shown in answer, and thereupon he (Mr. Vasani) assessed and imposed the extra duty of Rs. 75,925/14/- rightly and honestly. He says that it is for him both to make a proper classification of the goods under the Sea Customs Act and also to satisfy himself that the goods are such as have been prohibited to be imported. He is duly authorised in this behalf by the Chief Customs Authority.

It appears however that immediately after the Memorandum dated the 16th March 1950 was issued by the Customs Authorities a letter was written on the same date in reply to the memorandum, and the petitioner submitted the relative correspondence,

ident, acceptance notes etc. as asked for by the memorandum. There was no date or time for hearing fixed nor was the petitioner called upon to establish his case before the Customs Authorities. The petitioner sent a statement of its case by its letter of the 16th March 1950 and there the matter rested. It was not followed up by any hearing nor did the petitioner receive any notice fixing time or place for putting forward its case.

Civil.
—
1951.
Soorajmull
Nagarmull
v.
The Assistant
Collector of
Customs.
—
Bose, J.

It is the duty of the Customs Authorities to 'adjudge' (i.e. decree judicially) the penalty (sections 182 to 184). In other words the duty is to act judicially or quasi judicially [*Province of Bombay v. Khushaldas Advani* (1)]. The fundamental rules of judicial procedure or the principles of natural justice require that a proper hearing and opportunity should be given to a person before the rights of such person are affected by any decision or adjudication. The petitioner repeatedly asked for a copy of the Test report, this was never supplied to the petitioner. Without giving proper opportunity to the petitioner to put its case before the Customs Authorities extra duty is imposed and later on an order or demand for payment of Rs. 465,473/12/- is made upon the petitioner.

It was contended by the learned counsel for the respondents that the memorandum dated the 16th March 1950 gave sufficient opportunity to the petitioner to put forward its case as it called upon the petitioner not merely to produce certain documents but also all corroborative evidence. But this corroborative evidence may not consist of documentary evidence only in petitioner's possession but may be evidence produced by other dealers of such commodities or the statements or reports of experts who may support the case of the petitioner with Authoritative treatises or with their personal explanations. So a time and place has to be specified. The extent and scope of the enquiry must depend on the facts and circumstances and the magnitude of each case. It may be that the Customs Authorities cannot take oral evidence but they can hear the arguments of experts. No grounds of the decision by which the goods were found classification under item 27(3) were set out in the letter of 16th March 1950 nor otherwise communicated to the petitioner so as to enable it to make an effective or proper representation to the Customs Authorities. It is clear from the letter of the 16th March 1950 (Memorandum

(1) [1950] A. I. R. Sup. Court 222.

CIVIL.

—

1951.

Soorajnull

Nagarmull

v.

The Assistant

Collector of

Customs.

—

Bose, J.

No. S.27-58/50A) that a chemical test had been carried out but no copy of it was furnished to the petitioner inspite of repeated requests. It was put off on the ground that the test was not finalised, and even when it was actually finalised no copy was supplied of the final test report or results and the excuse put forward is that because the petitioner did not make a fresh request after the finalised test was made so no copy was supplied. This sort of excuse from responsible public officials is not only ridiculous but brings discredit upon themselves.

It was submitted that since the petitioner agreed by letter dated the 8th March to accept the result of the chemical tests carried out by the Customs Authorities it was not open to the petitioner to make a grievance of its not being supplied with a copy thereof.

I am not at all impressed by this suggestion. The undertaking to accept the result of the test cannot be stretched to mean that if the chemical analysis is arbitrary or malafide or erroneous on the face of it or is found to be actuated by extraneous consideration even then it will be binding on the petitioner and will preclude the petitioner from challenging the accuracy or validity of the same. Nothing can be more absurd than this.

In *Hopkins v. Smethwick Local Board of Health* (1). Wills J. observed.

"In condemning a man to have his house pulled down a judicial act is as much implied as in fining him 5 pounds, and as the local board is the only tribunal that can make such an order its act and the party to be affected should have a notice given him; and there is no notice unless notice is given of time when and place at which the party may appear and shew cause."

The Judicial Committee of the Privy Council in *Lapointe's case* (2) quotes with approval the following passage from the observation of Lord Chief Baron as to his view of the mode of administering justice by persons other than judges who have judicial function to perform:

(1) [1890] 24 Q. D. 712 (714-15).

(2) [1906] A. C. 535 (540).

"They are bound in the exercise of their functions by the rule expressed in the maxim "*Audi alteram partem*," that no man should be condemned to consequences resulting from alleged misconduct unheard, and without having the opportunity of making his defence. This rule is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals."

CIVIL.

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

Bose, J

The Customs Authorities are no doubt masters of their own procedure but they should observe the fundamental principles of natural justice. I do not for a moment suggest that they should follow the strict rules of judicial procedure but they are undoubtedly under a duty to act according to general principles. Reliance is placed by the learned counsel for the respondents on the case of *Local Government Board v. Arlidge* (1), which was cited by the Advocate General, and it is submitted that the petitioner had no right to be heard orally or to get a copy of the chemical test report and consequently there is no question of any violation of the principles of natural justice.

In that case the Local Government Board which was vested with the right to hear appeal from closing Order made under the Housing Town Planning Act, 1909 had by section 39 of the Act power to determine the procedure to be followed in appeal by rules framed for the purposes. But it was provided that the Board could not dismiss an appeal without first holding a public local enquiry. The rules framed contained a provision for local enquiry.

A local enquiry was held. The applicant sent only copies of expert's reports to the Board and intimated that he should decline to attend the enquiry and he did not appear or tender evidence. The rules provided for oral hearing at the enquiry but not before the Board in appeal. The applicant refused to avail himself of the opportunity at the time of the local enquiry. It was held that he had no right to ask for an oral hearing before the Officer deciding the appeal. He had also no right to insist on the Inspector's report of the local enquiry being disclosed

(1) [1915] A. C. 120.

CIVIL.

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

Bose, J.

because it was in the discretion of the Board to disclose it or not. This case is therefore distinguishable from the facts of the case before me.

In my view there can be no doubt that there has been a denial of natural justice and violation of the fundamental principles of judicial procedure and hence a Writ of Certiorari does lie, even though there may be an alternative remedy open to the petitioner by way of Appeal under the provisions of the Sea Customs Act and there is also the alternative remedy by way of a right of action under the general law. See *Rex v. Wandsworth Justices* (1).

It was contended that this Court has no jurisdiction to prevent enforcement of the Bond or Contract executed by the petitioner by writs of Mandamus or Certiorari. I do not accept this contention. There can be no doubt that the decision, whether a liability has arisen to produce a licence, or whether a bond has become enforceable, involves an adjudication. In other words such decisions are judicial or quasi judicial acts and as the entire proceedings are vitiated by reason of failure to observe the principles of natural justice, such decisions also can be quashed by writ of Certiorari. It appears that the Bond has been taken pursuant to rules under Sea Customs Act and in the prescribed form. It is true that this Court in the exercise of its extraordinary powers under Article 226 will not make an order discharging the Bond on the alleged grounds of coercion or duress and I do not propose to make any such order on this application but it is quite clear that it is open to this Court to quash the decision to the effect that the Bond has become enforceable, and consequently the liability to pay the penalty has arisen.

The conduct of the Customs Authorities shows that they have acted in an arbitrary manner. The goods arrived on the 6th March 1950. The petitioner was eager to get an early release of the goods for purposes of its trade. The Customs Authorities refused to release the goods unless a letter in terms of the letter of the 8th March 1950 was signed and handed up to them. The learned counsel for the Customs Authorities has admitted that in ordinary practice such a letter is not taken before the release of the goods. The petitioner is made to agree to accept the test

(1) [1942] 1 K. B. 281.

results of the samples and to agree to pay extra duty and penalty as a condition for immediate release of the goods. But although the letter is written and taken on consideration for immediate release of the goods and samples are collected on the 8th March 1950 goods are not released but instead of memorandum dated the 16th March 1950 is served on the petitioner intimating that a chemical test had been already carried out and the petitioner is called upon to explain why it would not pay extra duty and penalty for the goods and for the false declaration made in the Bill of Entry. Apparently the petitioner required the goods urgently, and so on that very day (16th March) the petitioner wrote a reply to the memorandum setting out a short statement of its case and forwarding the documents which were at the time in its possession. The Customs Authorities did not stop there but insisted on another letter being written and signed by the petitioner on the 22nd March 1950 in which they extort an undertaking to produce documents showing user of the oil as lubricating oil within three months as a condition for immediate release of the goods. But curiously they still hold on the goods and compel the petitioner to execute a Bond on the 28th March 1950 and to pay an extra duty of Rs. 75,925/- on that day and it is not till the 30th March 1950 that they allow the petitioner to take away the goods. Subsequently when the petitioner goes on repeatedly asking for a copy of the test report to be supplied to it and writes five or six letters and offers to pay the necessary fees, the petitioner is ultimately met with a reply on the 22nd May 1950 that the Test had not till then been finalised and the question whether a copy of the test report would at all be granted to the petitioner or not would be considered when the final decision was reached. It now appears that the test was finalised some time in July 1950 but no copy was furnished to the petitioner and the excuse now put forward for not supplying it is that the petitioner did not make fresh requests after the finalisation for being supplied with a copy. It is not suggested however how the petitioner would come to know whether the test was finalised or when it was finalised if it was not informed about these things. Without furnishing the petitioner with a copy of the test report or giving the petitioner any proper and reasonable opportunity to represent its case or defence the petitioner is faced with an order calling upon the petitioner to produce a proper license and on the 17th November 1950 the petitioner is called

CIVIL.

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

Bose, J

CIVIL.

1951.

Soorajmull
Nagaimull

v.

The Assistant
Collector of
Customs.

Bose, J.

upon to pay the penalty of Rs. 4,65,473/12/-. The language and tone of the correspondence and the attitude displayed by the Customs Authorities throughout their dealing with the petitioner leave no doubt that they have acted in a high handed and in an arbitrary manner and have arrived at their decision on extraneous and irrelevant considerations and not according to the provisions of the Statutes governing the matter.

It was contended that section 198 of the Sea Customs Act is a bar to these proceedings. I do not think that there is any force in such contention. The Customs Authorities have acted in an arbitrary manner and have taken into consideration extraneous and irrelevant matters in arriving at their decisions and passing the orders. In the circumstances it cannot be said that they were purporting to act in pursuance of the Act. A person by merely taking shelter under the plea that he honestly thought that he was acting in pursuance of the Act or Statute cannot bring himself within the terms of or the protection of the section, for if it were so, then in every case however dishonestly a person might be acting, however autocratic or arbitrary his acts might be he can shield himself under the protection of the Act by a mere declaration that he bonafide intended to act or thought that he was acting in pursuance of the Statute. The question whether the act is purported to have been done in pursuance of the Statute or not must depend on the special circumstances of each case. No hard and fast rule or test can be laid down for determining the question. If a person acts arbitrarily or in violation of the principles of natural justice or on the basis of extraneous or irrelevant considerations he cannot be said to be 'purporting to act in pursuance of the Act'. A person cannot disregard or ignore the provisions of the Statute and at the same time maintain that he is purporting to act in pursuance of that statute.

In the circumstances non-compliance with the requirements of section 198 cannot operate as a bar to the present proceedings.

It was contended that application for the issue of Prerogative Writs is not a 'proceeding' within the meaning of section 198 of the Sea Customs Act and reliance was placed on

certain English decisions *Rex v. London County Council* (1) per Lord Hewart C.J. and *Rex v. Port of London Authority* (2) It appears however that the Judicial Committee while construing 'Civil and Criminal Proceedings' in section 270 of the Government of India Act 1935 has interpreted the same to mean proceedings capable of being instituted under the ordinary law of the land: *Meads v. The King* (3). I am unable to hold that application for Prerogative Writs is not a 'proceeding' within the meaning of section 198 of the Sea Customs Act. It may be noted that in England also there are decisions to the contrary e.g. *The King v. Westminster Assessment Committee* (4).

CIVIL.
—
1951
—
Soorajmull
Nagaimull
v.
The Assistant
Collector of
Customs
—
Bose, J.

It was contended by the learned counsel for the petitioner that Article 226 of the Constitution has vested the High Court with Supreme and unqualified power to issue the prerogative writs in proper case. This power is not subject to any other provisions of the Constitution nor subject to the provisions of any law. Article 372 provides that all laws in force are subject to the provisions of the Constitution. Therefore in so far as section 198 purports to impose any fetter or restriction on the exercise of the absolute and unqualified power of the High Court as contained in Article 226 it must be held to be void to the extent of the inconsistency or repugnancy. In my view section 198 only impose a bar or disability on the person who seeks to commence proceedings in a court of law but it does not fetter or restrict the power of the High Court or affect the jurisdiction of the High Court in any way. If however it would tend to affect the power of the Court it would be void to that extent.

Apart from this it is well-established that in order that power of a court to issue writ of certiorari can be taken away by any statute there must be express negative words to take away the power (*Halsbury Vol. 9 paragraph 1455 page 861 Halsbury Ed.*).

But even in cases where certiorari is expressly taken away a writ may be issued if the inferior court or tribunal has acted without or in excess of jurisdiction [see *Ex parte Bradlaugh* (5); *Venkata Narasimha Rao Bahadur v. Municipal Council* (6), and also *Halsbury Vol. 9 paragraph 1458*].

(1) (1929) 141 Law Times 590.

(2) [1919] 1 K.B. 176 (186-188).

(3) (1948) 10 F.C.R. 67.

(4) [1917] 2 K.B. 215

(5) (1878) 3 Q.B.D. 509.

(6) [1931] A.I.R. Mad. 122.

CIVIL.

1951.

Soorajmull
Nagarmull

v.

The Assistant
Collector of
Customs.

Bose, J.

If inspite of an absolute bar imposed by a statute to initiate proceedings for the issue of a writ of Certiorari a person can apply for such writ and the Court can issue writ where there is want or excess of jurisdiction I fail to see why this Court cannot issue the writ in the present case when the Customs Authorities have exceeded their jurisdiction, merely because a partial bar in the shape of section 198 is imposed by the Sea Customs Act. I hold that this Court has jurisdiction and power to issue the writ of Certiorari asked for.

A point was raised by the learned Advocate General that the Assistant Collector of Customs is not the competent authority and had no jurisdiction to make the decisions or pass the orders complained of. I do not think that there is any substance in this contention. The Sea Customs Manual has been produced before me and it appears from paragraph 189 at page 192 of the Manual that there has been a delegation of authority to the Assistant Collector of Customs to exercise the powers under section 182(a) of the Sea Customs Act and he is fully authorised to exercise such powers.

In my view this petition must succeed in part. The Rule is made absolute to this extent that the orders and demands contained in the letters dated the 22nd September 1950 and the 17th November 1950 and made by the Respondents Nos. 1 and 2 are quashed and cancelled.

The petitioner will be at liberty to file suit or take any other proceedings as it may be advised for discharge or cancellation of the Bond of refund of extra duty paid or for such other reliefs to which the petitioner is entitled.

The petitioner is entitled to costs of the present proceedings.

The Rule as against the Union of India is discharged.

Mr. C. C. Basu: Solicitor for the Applicant.

Mr. S. K. Mondal: Solicitor for the Respondents.

S.K.R.C.

Rule made absolute in part.

Before Mr. Justice P. B. Mukharji.

SAILENDRA NATH BANERJEE

v.

SATYENDRA NATH ROY.*

CIVIL.

1950.

January, 17.

Specific Relief Act (I of 1877), Section 45—Writ of mandamus is always discretionary—Suit, if a "Specific legal remedy" within the meaning of Section 45 of the Specific Relief Act—Form of writ of mandamus or order in the nature of mandamus—Authority of judgment—"Misrepresentation" under Rule 65 of Schedule 17 of the Calcutta Municipal Act (Bengal Act III of 1923)—Persons to be satisfied under Rule 65 of Schedule 17 of the Calcutta Municipal Act.

An order in the nature of mandamus is always discretionary. If the conduct of the applicant is not consistent with good faith the Court is justified in refusing the order even though the applicant may otherwise make out a case.

A suit is not a "Specific legal remedy" within the meaning of Section 45(d) of the Specific Relief Act. The word "specific" is the antinomy of the word general. Right of suit is a general remedy and not a specific remedy.

The view that a right of suit is a bar to mandamus or an order in the nature of mandamus will make the Section 45 of the Specific Relief Act ineffective and nugatory for all practical purposes.

Every judgment must be read as applicable to the particular facts and is only an authority for what it actually decides and not for the proposition that seems to follow logically from it.

No mandamus or an order in the nature of mandamus can be issued in a form which cannot be complied with. The language of the Section 45 of the Specific Relief Act permits the Court to make an order "requiring any Specific Act to be done or forborne" which is not satisfied by the Court merely enunciating the law on the subject and then directing the public officer to act according to the law or the statute. The Court has

* Application under Section 45 of the Specific Relief Act against the Administrative Officer of the Corporation of Calcutta for forbearance from giving effect to and for withdrawal of an order made by him on the 17th June, 1949.

CIVIL.

—

1950

—

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

—

to go further and say what Specific Act has to be done or forbore and indicate in that order what the law is as applied to the particular facts of the case. An order under Section 45 of the Specific Relief Act must therefore be made in Specific terms to do or forbear from doing some specific and particular act.

Misrepresentation under Rule 65 of the Schedule 17 of the Calcutta Municipal Act can be only by positive statement of wrong facts or by suppression of material facts. The suppression of facts that the Corporation had previously refused sanction for any construction is "material misrepresentation" within the meaning of the Building Rules. Misrepresentation may be innocent or deliberate.

The persons to be satisfied under Rule 65 of the Schedule 17 of the Calcutta Municipal Act is the Corporation. As long as the Corporation acts in good faith it is the satisfaction of the Corporation which the law enjoins and it is not for the Court to be satisfied or to criticise and examine the reasons and grounds of the satisfaction of the Corporation.

No suit lies to compel a corporation either to approve building plans or to cancel an order revoking sanction of building plans.

Application by Sailendra Nath Banerjee under Section 45 of the Specific Relief Act

The material facts appear from the judgment.

Mr. K. K. Basu for the Applicant.

Mr. H. Rahman for the Respondent.

The judgment of the Court was as follows:—

January, 17.

P. B. Mukharji, J.:—This is an application under Section 45 of the Specific Relief Act. The applicant is Sailendra Nath Banerjee residing at 41-A, Sibnarayan Das Lane, Calcutta. The respondent is Satyendra Nath Roy, the Administrative Officer of the Corporation of Calcutta, under the Corporation of Calcutta (Temporary Supersession) Act, 1948.

The applicant moved the application before Banerjee J. and obtained an *ex parte* Rule against the respondent on the 20th September, 1949. The Rule directed the respondent to show cause "why he should not (a) forbear from giving effect to and/or (b) recall or withdraw forthwith the order made by him dated the 17th June, 1949.

The facts of the case may be briefly summarised. The applicant is the owner and occupier of the premises No. 41A, Sibnarayan Das Lane, Calcutta. On the 19th November, 1928, the Building Committee of the Corporation sanctioned a plan for construction of a two-storied building on the said premises. A part of the construction on the first storey except one room in the South East was completed according to the sanction. But the commencement of the construction of the second storey was made after the sanction had actually lapsed and the work was stopped by the Corporation under section 365 of the Calcutta Municipal Act. Thereupon sometime in 1934 the applicant applied for a renewal of the sanction under Rule 64 of Schedule 17 of the Calcutta Municipal Act. By a resolution of the Building Committee of the Corporation dated the 29th March, 1935, the previous sanction of the Corporation was renewed subject to the condition that the applicant should not build on the portion marked A B C D on the plan in the second storey. On the 24th August 1936 the premises were inspected and it was detected that the applicant had actually started building on the portion marked A B C D which I will refer hereafter as the prohibited portion. The construction was immediately stopped and Police was posted and ultimately the Police was withdrawn on the applicant giving an undertaking not to build any further. A resolution of the Building Committee of the 18th July 1941 provided that if the applicant reduced the height of the unauthorised wall to 4 feet within a week the case against the applicant would be dropped and failing compliance an application would be made by the Corporation to the Municipal Magistrate under section 363 of the Calcutta Municipal Act for demolition. The applicant complied with the direction and the proceeding against the applicant was withdrawn.

The next stage so far as the facts are concerned is reached when the applicant made a fresh application on the 30th August 1948 to the Corporation for sanction of a plan to build on the prohibited portion. But the applicant suppressed the fact in this application that the Corporation had previously refused sanction to build on the prohibited portion. By such suppression of the fact the applicant managed to obtain the sanction of the Corporation to build on the prohibited portion and such sanction was obtained on the 31st January, 1949. No

CIVIL

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

CIVIL.

1950.

Sailendra Nath
Banerjeev.
Satyendra Nath
Roy.

Mukharji, J.

sooner had the applicant started building on the basis of the new sanction of the 31st January 1949 complaint was received by the Corporation from adjoining owners giving reference to the previous demolition case whereupon the Corporation took steps for the revocation of the sanction and by the order of the respondent Administrative Officer dated the 17th June 1949 the sanction granted on the 31st January 1949 was cancelled. The terms of the order of the 17th June, 1949, revoking the sanction are as follows:—

“Orders of the Administrative Officer:

I accept the Special Officer's report. For reasons stated in his report I am satisfied that the departmental sanction to the plan submitted in 1949 would not have been accorded if there were not the material misrepresentations. The sanction No. BS381 of the 31st January 1949 is hereby cancelled.”

The respondent passed this order revoking sanction under Rule 65 of Schedule 17 of the Calcutta Municipal Act. The material portion of Rule 65 which is relevant for the purpose of this application runs as follows:—

“If at any time after permission to erect any masonry building has been given, the Corporation were satisfied that such permission was granted in consequence of any material misrepresentation * * * they may cancel such permission.”

The question therefore that is raised on this application lies within a narrow compass and it is whether the suppression of the fact that previous sanction was refused by the Corporation was a “material misrepresentation” under Rule 65 of Schedule 17 of the Calcutta Municipal Act so as to justify revocation of the sanction and if so whether such an order for revocation can be corrected by an order under section 45 of the Specific Relief Act upon the respondent Administrative Officer.

Mr. K. K. Basu, learned counsel for the applicant has urged that the applicant owed no duty under any law to state the fact of previous refusal by the Corporation or to make any reference

to previous proceedings in the fresh application which resulted in the sanction dated the 31st January 1949. His next argument is that the words "material misrepresentation" in Rule 65 must mean such misrepresentation as the Corporation could not discover. He developed this point of his argument saying that if the Corporation was efficient in its administration it could easily have found out that the Corporation had previously refused sanction. His submission is that it was the fault of the Corporation that the fact of the previous refusal escaped its notice and the Corporation cannot rely on its own negligent administration and cancel the sanction on the ground of "material misrepresentation." The Corporation had refuted the charge of inefficient and negligent administration on grounds which are not necessary for me to discuss for the purposes of this application.

Civil.
—
1950
—
Sailendra Nath
Banerjee
v.
Satyendra Nath
Roy.
—
Mukharji, J.

In my opinion the facts of this case do constitute "material misrepresentation" by suppression of the fact of the previous refusal to sanction construction on the prohibited portion and reading the affidavits it is my impression that the applicant attempted after a number of years to take the Corporation un-awares on the point. Misrepresentation can be either by positive statement of wrong facts or by suppression of material facts. The fact that the Corporation had previously refused sanction to any construction on the prohibited portion of the plan was in my opinion "material." The suppression of that fact is in my judgment "misrepresentation."

It appears to me immaterial whether the Corporation could with efficient management discover the fact of the previous refusal. Mr. Basu's argument that the applicant owes no legal duty to the Corporation to state the fact of previous refusal or condition attached to the previous sanction is in my view unsound. Owing a legal duty is a precondition of the tortious liability for negligence but is not so in this context. He may or may not owe a legal duty but if he does not state all material particulars and all material facts relating to the construction that may amount to misrepresentation under Rule 65. Misrepresentation in this context may be innocent or deliberate. It means failure to make a proper representation.

CIVIL.

1950.

Sailendra Nath

Banerjee

v.

Satyendra Nath

Roy.

Mukharji, J.

Where a permission once granted by the Corporation lapses, Rule 64 of Schedule 17 requires that a "fresh application" should be made asking for "fresh permission." Where the erection of the building has not commenced inspite of grant of permission and a substantial portion of the building is not completed within 3 years after the date of permission, sub-rule 1 of rule 64 requires a "fresh application for a 'fresh permission'". Where building has been commenced and a substantial portion of it has already been completed sub-rule 2 of rule 64 requires that the applicant must obtain a certificate that the building had been commenced and a substantial portion of it had already been completed. In my opinion when a "fresh" application is made under Rule 64 that fresh application should state the facts leading to such an application and which in my view must include the conditions under which the previous sanction was granted or else there will be misrepresentation.

The language of rule 65 makes it abundantly clear that the person to be satisfied that permission was obtained as a consequence of material misrepresentation is the Corporation. The order of the 17th June 1949 which is challenged in this application states on the face of it that the Corporation are satisfied. No question here arises whether the satisfaction is to be of this Court, nor does any question arise here whether such satisfaction of the Corporation has to be reasonable or not. As long as the Corporation acts in good faith it is the satisfaction of the Corporation which the law enjoins and if the Corporation is so satisfied there is in my opinion an end of the matter and it is not for the court to scrutinise and examine the reasons and grounds of its satisfaction.

Mr. Basu in answer to the argument that the satisfaction of the Corporation is final under rule 65 has relied on the case of *Eshugbayi Eleko v. The Government of Nigeria* (1). In my view that decision and its principles have no application to the facts of the present application before me. There it was held by Lord Atkin delivering the judgment of the Privy Council that the courts can under certain circumstances investigate whether the necessary conditions for the passing of an order are satisfied. Lord Atkin illustrated the limits of this doctrine by giving the example of the powers of the English Home

(1) [1931] A.C. 662.

Secretary to deport aliens. If the Home Secretary deported a British subject in the belief that he was an alien then the court can certainly question the validity of that order on the ground that there has been excess of power in the sense that the Home Secretary instead of applying his powers to an alien has applied them to a British subject who is not within this particular jurisdiction of his. In the actual case before the Privy Council which was concerned with an Ordinance relating to the deported Chief of Nigeria the Privy Council naturally held that before applying that Ordinance or purporting to act under it the Court could certainly go into the question whether the applicant at all came within the ambit or powers of the Ordinance viz. whether the applicant was a Native Chief or whether he had been in fact deported. But that is not the point on this application before me. Here rule 65 makes it clear that the Corporation has to be satisfied whether there was any material misrepresentation. As long as the Corporation acts bonafide that satisfaction of the Corporation is in my opinion, final on the point as to whether there has been material misrepresentation or not. The question raised here is more akin to the principles and questions decided by the House of Lords in *Liversidge v. Anderson* (1). If the Corporation acts beyond its powers in the sense that it revokes a sanction not on the ground of material misrepresentation at all or it acts malafide then of course the courts can question such an order. In my opinion the Privy Council in *Sibnath Banerjee's case* (2) dealing with the question whether "Government is satisfied" settled the law against the applicant's contention on this point.

CIVIL

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

Mr. Basu also made a point that it was not the respondent Administrative Officer of the Corporation who was satisfied but some one else by the name of Mr. Perkes who was the Special Officer. I cannot accept that argument. The order of the 17th June 1949 says that it was the Administrative Officer who was satisfied. If he had employed a Special Officer to make a report he was quite justified in my view in doing so and I see no reason why he should not depend on the report of investigation of a Special Officer of the Corporation. After the report was made the Administrative Officer accepted that report and was himself satisfied. The Administrative Officer of the Corporation has

(1) [1942] A.C. 206.

(2) L.R. 72 I.A. 241.

CIVIL.

1950.

Sailendra Nath

Banerjee

v.

Satyendra Nath

Roy.

Mukharji, J.

clearly powers under section 51 of the Calcutta Municipal Act to appoint a Special Officer.

An order under section 45 of the Specific Relief Act by the language of the section "may make an order" and being in the nature of a mandamus is an order generally in the discretion of the Court. That discretion must however be judicially exercised. It is not an order which an applicant can claim as a matter of right. One of the principles which should guide the Court's discretion is to see whether in respect of the matter in controversy there is in the conduct of the applicant utmost good faith and complete *uberrima fides*. If the conduct of the applicant is not consistent with such good faith the Court in my opinion will be justified in refusing this order even though the applicant may otherwise make out a case for it. As Lord Chelmsford observes in *Queen v. Churchwardens of All Saints Wigan* (1). "The Court may refuse to grant the writ not only on the merits but upon some delay or other matter personal to the party applying for it; in this the Court exercised a discretion which cannot be questioned." In this case I am satisfied that the conduct of the applicant in (a) suppressing the fact of the previous refusal of the Corporation to sanction construction on the prohibited portion and (b) in committing breach of the undertaking which the applicant gave in the previous proceedings relating to construction on this prohibited portion is such that the Court should in its discretion refuse to grant him the order that he seeks.

Mr. Rahaman appearing for the respondent has urged two technical grounds on which he asks me to refuse the order. One is that there is a remedy by way of a suit in this case which he says is a specific and adequate legal remedy. The other is that the form of the Rule issued is such that it is not possible to comply with it.

Before considering the question whether a suit or a right of action can be said to be a "specific and adequate legal remedy" within the meaning of section 45(d) of the Specific Relief Act it is necessary to determine if a suit or an action to compel a Corporation either to approve building plans or to cancel an

(1) [] 1 A.C. 611 (620).

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

order revoking sanction of building plans would at all be competent. In my judgment such an action does not lie. In *Smith v. The Chorley District Council* (1). Kennedy J. after a very full and elaborate discussion of the authorities on the point in England came to the conclusion that an action for mandamus (injunction) will not lie to compel a local authority to approve building plans and the proper remedy is by applying for the prerogative writ of mandamus. The decision of Kennedy J. was affirmed on appeal by Lord Esher M. R. and Lopes L. J. in *Smith v. Chorley Rural Council* (1). These principles of law have been followed by this High Court. Fletcher J. in *Prosad Chunder De v. Corporation of Calcutta* (2) holds that no suit is maintainable to have plans approved or for damages, and the only remedy is by an application under section 45 of the Specific Relief Act. Indeed in that case the suit was dismissed on that ground. Although that case was on the old Municipal Act there are corresponding and similar and *paria materia* provisions under the present Calcutta Municipal Act, its Rules, Bye-laws and Schedules. I respectfully follow that decision. In this Court an order under section 45 of the Specific Relief Act has been granted in a series of cases dealing with building plans—as for example in *re. Sm. Lakshmimoni Dassi* (3) by Ameer Ali J., in *A. C. Mohammed v. The Corporation of Calcutta* (4) by Panckridge J. and in *Hirendra Nath Dutt v. The Corporation of Calcutta* (5) by Edgley J. If a suit were to be brought on the facts of a case like this then such a suit could only be either in the nature of a declaration that the order of cancellation of the Corporation is bad and should be set aside and/or for an injunction restraining the Corporation from giving effect to that order of cancellation. I do not consider that such a declaration is within the meaning of section 42 of the Specific Relief Act as the applicant in my opinion is not enforcing any “legal character” or “right to any property” as contemplated by that section. Such a declaratory suit will be “an eccentric declaration,” on which strong comment was made by Jenkin, C.J. in *Deokali Koer v. Kedarnath* (6) where the learned C. J. deprecated the multiform and at times eccentric declarations which do not come strictly within the meaning of section 42 of the Specific Relief Act. When a person wants to build on his

(1) [1897] 1 Q.B. 532 and 678.

(4) (1940) 45 C.W.N. 408.

(2) (1913) I.L.R. 40 Calc. 836.

(5) (1941) 45 C.W.N. 413.

(3) (1940) 45 C.W.N. 401.

(6) (1912) I.L.R. 39 Calc. 404.

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

own land he cannot, in my opinion, be said to be claiming any "legal character" within the meaning of section 42 of the Specific Relief Act nor do I consider that the right to be able to build up one's land is itself a property within the meaning of that section. Without such a declaration I do not consider a suit for an injunction would be competent. See *Smith v. Chorley District Council* (1) and *Prasad v. Corporation of Calcutta* (2). A suit for injunction which would purport to restrain the Corporation from giving effect to the order for cancellation would lead to a statement in the sense that whereas there would be no declaration available stating that the order for cancellation is invalid the applicant will be without any properly sanctioned building plan by the Corporation which would entitle him to build, because such an injunction in my opinion will not revive the previous sanction of the Corporation. A relief in the nature of an injunction being an equitable relief should not be granted in vain.

Even if it is possible to frame a suit I do not consider that a suit can be specific legal remedy within the meaning of section 45(d) of the Specific Relief Act. On this question there is considerable divergence of judicial opinion which it is hoped will in near future be composed by the highest court in the land, as it is a matter of the greatest concern for the subject and the government alike and on which therefore the courts should speak with one voice. Greaves J. in *re Manuck Chand Mahata v. Corporation of Calcutta* (3) expressed the view that a suit is not a specific and adequate legal remedy. That view was in substance followed by Panckridge J. in *Garrison Engineer, Fort William v. Corporation of Calcutta* (4) although he did not think it necessary to accept the further view of Greaves J. that the specific remedy must be limited to a specific remedy as expressly given by a particular statute. In the 6th Edition of Mulla and Pollock's *Contract Act and Specific Relief Act* the learned commentators expressed the view at page 865 that the limitation that specific remedy must be given expressly by a particular statute was incorrect but it is to be observed that the commentary of Mulla and Pollock did not express any adverse criticism of the view of Greaves J. that the right of suit

(1) [1897] 1 Q.B. 532 and 678

(3) (1921) I.L.R. 48 Calc. 916 (924)-

(2) (1913) I.L.R. 40 Calc. 836.

(4) (1937) 42 C.W.N. 789 (792).

is a general right. A Special Bench of this High Court in *M. M. Ispahani Ltd. v. Inspecting Assistant Commissioner of Income Tax* (1) observes at p. 454 of that Report "In my (Chatterji J.) opinion the mere possibility of right of action is not enough to bar the resort to Section 45 of the Specific Relief Act" and the three decisions *Garrison Engineer of Fort William v. Corporation of Calcutta* (2), *Khursed Mody v. Rent Controller, Bombay* (3), *Dorman Lang & Co. Ltd. v. Jagadish Chandra Mahindra* (4), were followed and relied on. I feel that this observation in the Special Bench decision of this Court is binding on me sitting as a single Judge of the Court. Besides it is not the expression of one single Judge in one solitary case. Banerjee J. in the recent decision in *re. Nanilal Ray v. Satyendra Nath Ray* (5), dissented from the view of Greaves J., in *Manick Chand Mahata's case* (6), and followed the decision of the Court of Appeal of the Bombay High Court in *Lady Dinbhai Petit v. M. S. Naronha* (7), without any reference to the decision of Panckridge J. or the observation of Chatterjee J. in the Special Bench of this Court. Kania C. J. in that Bombay decision although dissenting from the view of Greaves J. did so by way of *obiter dictum* as the learned C. J. at p. 860 of that Report made the observation "I do not propose to discuss the question of fulfilment of conditions (d) and (e)." The Bombay High Court referred to three English decisions *Queen v. Charity Commissioners* (8), *R. v. Leicester Union* (9), and *R. v. Dymock* (10), for the purpose that the right of acting will defeat an application for the prerogative writ of mandamus. The Bombay Court however held that the suit in that case was no bar to an order under section 45 of the Specific Relief Act on the ground that the remedy by suit was inadequate because of the requirements of the notice under section 80 of the Code of Civil Procedure. Banerjee J. has also referred in addition to those English cases to three more English decisions, one is *King v. The Bank of England* (11), the other is

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

- (1) (1948) 53 C.W.N. 434.
- (2) (1937) 42 C.W.N. 789.
- (3) (1946) 48 Bom. L.R. 565.
- (4) (1934) I.L.R. 62 Calc. 596.
- (5) (1949) 54 C.W.N. 42.
- (6) (1921) I.L.R. 48 Calc. 916.
- (7) [1946] I.L.R. Bom. 832.
- (8) [1897] 1 Q.B. 407.
- (9) [1899] 2 Q.B. 632.
- (10) [1915] 1 K.B. 147.
- (11) (1780) 2 Douglas 524.

CIVIL. *Re. Barlow* (1), and another is *Queen v. Registrar of Joint Stock Companies* (2), for the proposition that suit is a sufficiently specific and adequate legal remedy within the meaning of section 45(d) of the Specific Relief Act. The Bombay High Court has not spoken with one voice on the subject. Bhagwati J. in *Tan Bug. v. Collector of Bombay* (3), discussing the same question at p. 261-2 referred to the decision of Greaves J. in *Manick Chand Mahata v. Corporation of Calcutta* (4), and observed that without accepting the views of Greaves J. in its entirety "there is no doubt that he considered a general right of suit not within the meaning of the specific and adequate remedy mentioned in the proviso (d) to section 45 of the Specific Relief Act." Bhagwati J. did not express his dissent from that view although as it so often happen on this pointed the learned Judge proceeded on the ground of adequacy of the remedy provided by a suit.

1950.
Sailendra Nath Banerjee
v.
Satyendra Nath Roy.
Mukharji, J.

Before an appeal is made to the English cases for support of the view that the suit or a right of action will defeat an application under section 45 of the Specific Relief Act it is essential in my opinion to consider whether the statutory expression "specific and adequate legal remedy" in section 45(d) of the Specific Relief Act is on a par in language and content with the theory of alternative legal remedy which bars issue of the prerogative writ of mandamus in England. In the House of Lord's decision in *Queen v. Southampton Port Commissioners* (5), Blackburn J. at p. 471 makes the following observations "the duty imposed is a plain legal duty and though a Court of Equity may have concurrent power to enforce its performance that does not take away the Common Law right to a mandamus." This observation shows that inspite of the English cases that is referred to both by the Court of Appeal of the Bombay High Court and by Banerjee J. an alternative remedy is not necessarily a bar even in England to the issue of the writ of mandamus. The observation in the House of Lords' case which I have just quoted shows that the theory of alternative or concurrent remedy in England is to be considered in the light of the remedies offered by the Courts

(1) (1861) 30 L J Q B. 271.

(2) (1888) 21 Q B.D. 131.

(3) [1946] A.I.R. Bom. 216.

(4) (1921) I L.R. 48 Calc. 916.

(5) (1870) L.R. 4 H.L. 449.

of Common Law and the Courts of Equity. The concurrent remedies offered by the Court of Equity in England would not defeat the Common Law remedy of a mandamus and therefore it will be inappropriate in my view to pick up certain English decisions and to come to a general conclusion on the point. In England the writ of mandamus itself was and is a Common Law remedy. When the Common Law Courts fail to supply the defects of Common Law Justice the King issued the writ of mandamus to supply such defect. Hence the origin or the rule that where there was a right of action which was a Common Law right, the writ of mandamus could not be asked. As the history of the prerogative writ of mandamus shows it is where the Common Law Courts fail in providing a remedy it is only there and then that the writ is issued. In Tapping's well known Treatise on the Law and Practice of the Prerogative Writ of Mandamus 1848 Edn. at p. 20 a list of actions is given which would be considered as a bar to the issue of the writ of mandamus and is in the following terms "it has been decided that a remedy by the following actions is sufficient for the Court to refuse the writ namely an action on the case or special assumpsit, so also an action of debt or those of trover or detinue. A remedy by ejectment is also a bar to the issuing of the writ." An analysis of this list of actions shows that they are all Common Law actions and not remedies in equity such as declaratory suits or bills or injunction. Indeed Tapping at p. 22 of that Work observes "where a legal right exists it is no answer to an application for a mandamus to show that there is also a remedy in equity, for when the court refuses to grant the writ because there is another specific remedy, it means a specific remedy at Law." This remark supports the observation of Blackburn J. in the House of Lords decision.

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

I propose to deal at some length on the English cases to which reference has been made both by the decision of the Court of Appeal of the Bombay High Court and the decision of Banerjee J. as supporting the proposition that a suit is a specific remedy. In *Queen v. Charity Commissioner* (1), Wright J. came to the conclusion that there were two alternative remedies in that case viz. (1) an application under the Charitable Trust Act, 1853 and (2) the Ordinary Jurisdiction of the Courts by injunction or declaration of rights. The remedy under the

(1) [1897] 1 Q.B. 407.

CIVIL.

1950.

January, 17.

Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

Charitable Trust Act was certainly a specific remedy and there can be no dispute regarding that. But in so far as Wright J. comes to the conclusion that the ordinary jurisdiction of the Courts by injunction or declaration of rights, it is in my view contrary to the opinion expressed by the House of Lords in *Queen v. Southampton Port Commissioners* (1), and the observations of Tapping on Mandamus to which I have already drawn attention. Injunction and declaration were remedies given by the Courts of Equity. Injunction was clearly an equitable relief and declaratory suits were first introduced in England by section 50 of the Chancery Procedure Act 1852 and was a remedy granted by the Chancery Courts of Equity. Therefore the opinion of Wright J. that relief by way of injunction or declaration of rights is an alternative remedy to bar the issue of the writ of mandamus is directly contrary to the view expressed by Blackburn J. in the House of Lords case where the House of Lords came to the conclusion at p. 449 that though the Court of Equity may have concurrent power to enforce performance that does not take away the Common Law remedy of mandamus. With respect I consider the view of the House of Lords to be in greater consonance with the principles which guided the writ of mandamus on this aspect and I follow that decision in preference to the view of Wright J. Not one of the other English cases cited by the Court of Appeal of the Bombay High Court or by Banerjee J. is in my view an authority for the proposition that a suit is a specific remedy. In *R. v. Leister Union* (2), and as I read the report of that decision I find nothing which can be said to be an authority for the proposition that a suit is a specific remedy. My reading of the report is that it is an authority for the proposition that the alternative remedy must be a *remedium juris* and not departmental or administrative remedy provided by the Act. The next case is *R. v. Dymock* (3). Here Darling J. at p. 153 only accepted the argument of Mr. Hensell at p. 149 showing cause against the Rule that if the applicant was validly appointed to the office of Sexton he can bring an action against the Vicar and Church Wardens for wrongful dismissal or sue the person receiving the fees for money had and received. Now both such claims for wrongful dismissal of servants and for money had and received were Common Law

(1) (1870) L.R. 4 H.L. 449

(2) [1899] 2 Q.B. 632.

(3) [1915] 1 K.B. 147.

actions which will come within the category which Tapping has mentioned and to which I have already made a reference and was naturally held to be a bar to the issue of the prerogative writ of mandamus. The case of *In re. Nathan* (1), is not an authority for the proposition that a suit is a specific remedy. The observations of Brett M. R. at p. 472-5 were not made in connection with a right of suit and these observations were only made to show and to hold that a petition of right was a specific remedy under the Statute Petition of Right Act, 1860. Unquestionably a remedy given by any particular Act giving the same or alternative remedy is a specific remedy as was observed by Greaves J. The other case is *R. v. Registrar of Joint Stock Companies* (2). That again is not an authority for the proposition that a right of suit is a specific remedy. It is only an authority for the proposition that a remedy under the Stamp Act was an appropriate and alternative remedy sufficient to disentitle the applicant to the writ of mandamus. This was a case of a specific remedy given by Specific Statute which was held to be a sufficient alternative remedy. Then again the case of *R. v. Archbishop of Canterbury* (3), Lord Ellenborough C. J. spoke of the "Suppletory means of substantial justice," and was not concerned with a right of suit at all and his observations were not in connection with such right of suit. I do not find from the reports of this case any argument whatever to have been made or advanced of a suit or an action being an alternative remedy. I have carefully gone through the rather long and elaborate argument of the Attorney General in that case who showed cause against the Rule as it appears from p. 791 to p. 793 of the E.R. and have failed to find that a right of suit was ever argued in that case as a specific remedy. In *Queen v. Leatham* (4), Lord Chancellor, Lord Halsbury advised caution in relying on cases as precedents. The learned Lord Chancellor lays down two propositions (i) every judgment must be read as applicable to the particular facts and (ii) a case is only an authority for what it actually decides and not for the proposition that seems to follow logically from it. Except therefore the first case to which reference has been made it is obvious that in none of the other English cases on

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

(1) (1884) 12 Q.B.D. 461.

(2) (1888) 21 Q.B.D. 131.

(3) (1812) 15 East 118; 104 E.R. 789 (797).

(4) [1901] A.C. 495 (506).

CIVIL.

1950.

Sailendra Nath

Banerjee

v.

Satyendra Nath

Roy.

Mukharji, J.

which reliance has been placed for the proposition that a right of suit is a specific remedy is an authority for that particular proposition. I will deal lastly with the observations of Lord Mansfield in *R. v. The Bank of England* (1). Lord Mansfield was the great builder of the English Common Law and one of the most eminent Common Law Justices. The learned Lord in that case only decided that the Court did not grant mandamus to transfer the stock from the Bank of England because such a remedy could be had by action. But that again is a Common Law action that was spoken of and which has always been regarded as a sufficiently alternative remedy for another Common Law remedy of mandamus. But even then the learned Lord says at p. 335 "I do not consider this is a clear case" and comes to the conclusion that an action will lie for complete satisfaction 'equivalent' to specific relief. I do not consider therefore that it is an authority that a suit is a specific remedy. On the contrary the learned Lord was thinking of something which was 'equivalent' to specific remedy which ex-hypothesi was therefore not itself the specific remedy. No question of 'equivalent' right arises here where the Statute uses the language "specific" remedy.

'Right of action' or 'action' in most of these English cases means Common Law actions. "Suits" or "bills" are the counterparts of 'action' in equity jurisdiction in England. Even Wright J. in that solitary case from which I have dissented on the authority of the House of Lords does not speak of a suit in equity.

A number of English cases has been referred to both by the Court of Appeal of the Bombay High Court and by Banerjee J. and which I have just analysed. It will not be inappropriate before I leave the discussion of the English cases to draw the attention of other English cases in which a concurrent remedy in equity has been held not to be a bar to the issue of prerogative writ of mandamus. In *R. v. The Marquis of Stafford* (2), Buller J. at p. 785 observed "a party applying for a mandamus must make out a legal right, although if he showed such legal right and there be also a remedy in equity that is no answer to an application for a mandamus; for when the Courts

(1) (1780) 2 Douglas 525; 99 E.R. 334.

(2) (1790) 3 T.R. 647; 100 E.R. 782.

refuse to grant a mandamus because there is another specific remedy they only mean specific remedy at law." To the same effect is the observation of Lord Ellenborough C. J. in *King v. The Company of Free Fishers and Dredgers of Whitestable* (1). The observations of Buller J. were followed again in *King v. London Assurance Company* (2). Reference to English cases therefore sufficiently elucidate the principle that the theory of alternative legal remedy in England is to be understood against the background of the difference between remedy in Common Law and remedy in Equity. In India the technical rules of difference between rights and remedies at Common Law and Equity in England do not prevail. It is therefore essential in my view that when English cases are referred to in this connection the English Law should be understood only to bar mandamus in cases where Common Law remedies (and not equitable remedies) are available. My reading of the English cases and the principles laid down there is that an action at law is a specific legal remedy but not a suit in equity.

This aspect of the problem has not received sufficient attention and as at present advised I am unable to go to the length of saying that a right of suit is a specific legal remedy within the meaning of section 45(d) of the Specific Relief Act.

I have also two further considerations in my mind regarding this question. In my view each one of the words "specific" "adequate" and "legal" must be given due and proper meaning and each one of these words has to be duly construed and effect given to such construction. The word 'specific' is the antinomy of 'general.' Lord Heatherley in *Thomas Chaloner v. Henry Bolchow* (3), discussing the word "specific" observes "*specific* is ordinarily used in the common parlance of the language as meaning distinct from general." Section 9 of the Code of Civil Procedure gives the general remedy of a suit to an aggrieved person and as at present advised I am unable to accept the proposition that remedy by the exercise of a right of suit is a 'specific' remedy. I am inclined to the view that such a remedy is general as opposed to "specific." The other consideration is that section 45 of the Specific Relief Act is under

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

(1) (1806) 7 East. 353; 103 E.R. 136 (138).

(2) (1822) 5 B. and Ald. 899; 106 E.R. 1429.

(3) [1878] 3 A.C. 933 (938).

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy

Mukharji, J.

Chapter 8 of the Statute under the head "Of the enforcement of public duties." It concerns the doing or forbearing under any law for the time being in force and is only directed against a person holding a public office or a Corporation. A breach of a public duty enjoined on a public officer by a statute entitles the aggrieved person to an order provided the other conditions laid down in the section are complied with. If section 45(d) is construed in such a way that a right of suit is included within its meaning then a breach by a public officer of a public duty enjoined by a statute would be remediable in every case by a suit unless the statute itself barred the right of suit whose breach is complained of. Such a view in my judgment will practically make section 45 of the Specific Relief Act ineffective and nugatory in almost all conceivable cases except those rare cases where the Statute itself deprives an aggrieved person of his right of action. On a still closer examination of this consequence it will be apparent that such a deprivation of right of suit can never in theory take place because the contention will always be even in those cases that the public officer acted beyond the Statute and not under the Statute. This again is an argument which is not met by the decision of the Bombay High Court in appeal or of Banerjee, J.

These are my reasons for being unable to hold that a suit is a specific legal remedy within the meaning of section 45(d) of the Specific Relief Act and in expressing my inability to hold that view I do so with the profoundest respect for the weighty judicial opinion to the contrary.

The next question is whether the form of the Rule in this case is such that it is not possible to comply with it. The point is that the Rule Nisi directs the respondent (a) to forbear to give effect to and/or (b) to recall or withdraw the order made by him dated the 17th June 1949. Section 45(b) of the Specific Relief Act makes it quite clear that the doing or forbearing must be enjoined by the law for the time being in force. That was clearly laid down by the Privy Council in the *Commissioner of Income-tax v. The Bombay Trust Corporation* (1). Sir George Rankin delivering judgment of the Privy Council at p. 918 in the case makes the following observations; "before mandamus can be issued to a public

(1) (1930) L.R. 63 I A. 408, I.L.R. 60 Bom 900.

servant it must therefore be showed that a duty towards the applicant has been imposed upon the public servant by a Statute." I see nothing in the Calcutta Municipal Act or the Building Rules contained in Schedule 17 of that Act which makes it incumbent upon the respondent to forbear from giving effect to and/or recall or withdraw the order dated the 17th June 1949. Indeed my view is that once having made the order he cannot do either of the two things under the Statute or the Rules which the Rule Nisi purports to direct him to do.

Mr. Basu realises this difficulty and he meets it by the argument that an order can be made in the form that the Corporation should deal with the plans in accordance with the Calcutta Municipal Act and in accordance with the Rules contained in Schedule 17 thereof and he points out to me that such was the course adopted by Ameer Ali J. in *In re: Sm. Lakshmi-moni Dassi* (1), and by Edgley J. in *Hirendra Nath Dutta v. The Corporation of Calcutta* (2). I do not find from the reports in those cases any sufficient treatment at all of the point raised before me in this application. In *R. v. St. Pancras Church Trusts* (3), it is said that the Court has power to mould the Rule for a mandamus but cannot remould the writ after it has issued. In very exceptional circumstances the Rule may be amended on the hearing to meet the terms of a Statute such as was done in *R. v. Radnor* (4), but that was only for the purpose of making the Rule conform to a Statute. In this case I do not consider that the Rule can be so amended. In my judgment an order under section 45 should be made in specific terms to do or forbear from doing some specific and particular act. The language of section 45 permits this Court to make an order "requiring any specific act to be done or forborne" which in my opinion is not satisfied by this Court merely enunciating the law on the subject and then directing the Corporation or the public officer to act according to the Statute. This Court has to go further and say as to what "specific act" has to be done or or forborne and indicate in that order what the law is as applied to the particular facts of the case.

The application in my judgment therefore fails and the Rule is discharged with costs.

Messrs. H. N. Dutta & Co.: Solicitors for the Applicant.

Mr. N. C. Mitter: Solicitor for the Respondents.

S.K.R.C.

Rule discharged with costs.

(1) (1940) 45 C.W.N. 401 (408). (2) (1941) 45 C.W.N. 413 (420).

(3) (1835) 3 Ad. and El. 535; 111 E.R. 517.

(4) (1446) 5 Jur. 460; 16 Emp. Dig. 329.

CIVIL.

1950.

Sailendra Nath
Banerjee

v.

Satyendra Nath
Roy.

Mukharji, J.

SUPREME COURT.

Present: Mr. Justice M. Patanjali Sastri, Mr. Justice Mehr Chand Mahajan and Mr. Justice Bijan Kumar Mukherjee.

CIVIL.

FIRM SRINIWAS RAM KUMAR

1951.

v.

February, 9.

MAHABIR PRASAD AND OTHERS.*

Specific performance of a contract to sell a house —Plaintiff fails to prove contract of sale—Defendant admits a loan from the plaintiff—No claim for loan advanced in the plaint—Absence of any alternative case in the plaint—Court, if can give relief to the plaintiff on the basis of an alternative claim which is admitted by the defendant and could have been made by the plaintiff—Concurrent findings on pure questions of fact in the courts below, when can be interfered with in appeal.

When the Courts below have given concurrent findings on a pure question of fact Supreme Court would not ordinarily interfere with those findings and review the evidence for the third time unless there are exceptional circumstances justifying departure from these normal practice. The position may undoubtedly be different if the interference is one of law from facts admitted and proved or where the finding of fact is materially affected by violation of any Rule of Law or Procedure.

A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The Rule undoubtedly is that the Court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleading and which the other side was not called upon or had an opportunity to meet.

But when the alternative case which the plaintiff could have made was not only admitted by the defendant in his written statement but was expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.

Appeal by the Plaintiff.

Suit for specific performance of a contract to sell a house in the town of Gaya.

* Civil Appeal No. 82 of 1949 against the judgment and decree dated 29-8-47 of the Patna High Court in F.A. 13 of 1945 (*Manohar Lal and Ramaswami, JJ.*) arising out of the decree dated 11-3-44 in Suit No. 59 of 1943 of the Court of Sub-Judge, Gaya.

The material facts appear from the judgment.

CIVIL.

Mr. S. P. Sinha, (Mr. C. R. Pattabhi Raman and Mr. B. K. Saran, with him), instructed by Mr. R. C. Prasad, Agent for the Appellant.

1951.

Firm Srinivas
Ram Kumar

v.

Mahabir Prasad

Mr. Uday Bhan Chaudhury, for the Respondents 1 and 2; Mr. Harish Chand (Mr. N. C. Sen, with him) for Respondents 3 to 7, instructed by Shri Tarachand Brijmohan Lal, Agent.

The judgment of the Court was delivered by:—

B. K. Mukherjea, J.:—This appeal is on behalf of the plaintiff and it arises out of a suit for specific performance of a contract to sell a house in the town of Gaya, belonging to the defendants second party who, it is alleged, agreed to sell the house to the plaintiff but subsequently resiled from the agreement and sold the same to the defendants first party who purchased it with notice of the contract.

February, 9.

The plaintiff's case, in substance, is that in September 1941 the defendants second party, who owned a house at Gaya, entered into negotiations for sale of the same, with one Jadu Ram, and the title deeds of the property were actually handed over to the latter. These negotiations failed and the second party defendants thereupon approached the plaintiff firm and a contract was entered into by and between them sometime towards the end of October 1945, and which the former agreed to sell to the latter their house at Gaya for a consideration of Rs. 34,000. Out of this consideration, a sum of Rs. 30,000 was paid by the plaintiff firm on behalf of the vendors to a creditor of the latter on 28th October 1941. The vendors in their turn put the plaintiff in possession of the house agreed to be sold in part performance of the contract and promised to execute a conveyance as soon as the title deeds were returned to them by Jadu Ram and the balance of consideration money amounting to Rs. 4,000 was paid by the plaintiff. The second party defendants, however, went back on their promise and did not execute the conveyance in favour of the plaintiff even after they got back their title deeds from Jadu Ram; and on the other hand, they sold the house to the defendants first party on August 13, 1943. The plaintiff was thus obliged to bring this suit, claiming specific performance of the contract of sale.

CIVIL.

1951.

Firm Srimivas

Ram Kumar

v.

Mahabir Prasad

Mukherjee, J.

The suit was contested by both sets of defendants. The second party defendants contended *inter alia* that they never agreed to sell their house at Gaya to the plaintiff, and the story of a contract of sale as set up by the plaintiff was entirely false. They admitted that they were in need of money and hence approached the plaintiff for a loan and the plaintiff did advance to them a sum of Rs. 30,000 carrying interest at 6% per annum. It was entirely for facilitating payment of interest due on this loan and not in part performance of the contract of sale that the plaintiff was put in possession of the same.

This defence was reiterated by the first party defendants who further pleaded that they were *bona fide* purchasers for value having no notice of any contract of sale with the plaintiff.

The Subordinate Judge, who heard the suit, came to the conclusion, on the evidence adduced by the parties, that the story of a contract of sale, as alleged by the plaintiff, was not established and it was not in pursuance of any such contract that the plaintiff was put in possession of the house. It was held that the defendants' story was true and that the plaintiff did advance a sum of Rs. 30,000 to the defendants second party, but this was by way of a loan and not a part payment of the consideration money. So far as the first party defendants were concerned, it was held that they were *bona fide* purchasers for value without notice. In view of these findings, the Subordinate Judge dismissed the plaintiff's claim for specific performance but as the second party defendants admitted that they had taken an advance of Rs. 30,000 from the plaintiff, a money decree was given to the plaintiff for this sum against these defendants with interest at 6% per annum from the date of the suit till realisation.

Against this decision, the plaintiff took an appeal to the High Court at Patna, and the second party defendants also filed cross-objections challenging the propriety of the money decree that was passed against them. The appeal was heard by a Division Bench of the Patna High Court who, by their judgment dated August 29, 1947 dismissed the appeal of the plaintiff and allowed the cross-objections preferred by the second party defendants. The learned Judges held, concurring with the trial court, that no case of concluded contract between the parties was

established by the evidence adduced in the case, and the fact of the plaintiff being put in possession of the house could not be regarded as an act of part performance of any such contract. The High Court agreed with the trial judge in holding that the sum of Rs. 30,000 was advanced as a loan by the plaintiff to the second party defendants, though the evidence was not very clear regarding payment of interest upon it, and that the first party defendants were purchasers for value without notice. The High Court held further that even if there was a contract, its terms were vague and indefinite, and as one of the vendors was a minor, no relief in equity by way of specific performance of the contract should be given in this case as it would substantially prejudice the interests of the minor. In the opinion of the High Court, the money decree granted against the second party defendants was not warranted in law as no case of a loan was made by the plaintiff in the plaint and no relief was claimed on that basis. The result was that the suit was dismissed in its entirety and the decree for recovery of money that was made in favour of the plaintiff by the trial court was set aside. It is against this judgment that the plaintiff has come up on appeal to this court.

CIVIL.

1951.

Firm Srinivas

Ram Kumar

v.

Mahabir Prasad

Mukherjee, J.

The learned Counsel appearing for the appellant contends before us that the findings upon which the courts below disbelieved the story of the plaintiff and dismissed the claim for specific performance are not proper findings of fact which could be legitimately inferred from the evidence adduced in this case. In the alternative it is argued that the High Court was wrong in setting aside the decree for money which was given against the second party defendants by the trial judge.

The first contention put forward by the learned Counsel appears to us to be plainly unsustainable. When the courts below have given concurrent findings on pure questions of fact, this court would not ordinarily interfere with these findings and review the evidence for the third time unless there are exceptional circumstances justifying departure from this normal practice. The position may undoubtedly be different if the inference is one of law from facts admitted and proved or where the finding of fact is materially affected by violation of any rule of law or procedure. The practice adopted by this court is similar to what has always been acted upon by the Judicial Committee. To

CIVIL.

1951.

Firm Srinivas
Ram Kumar
v.
Mahabir Prasad
Mukherjea, J.

quote the words of Lord Thankerton in *Bibhabati v. Ramendra Narayan* (1), "it is not by any means a cast iron practice;" there may occur cases of unusual nature which might constrain us to interfere with the concurrent findings of fact to avoid miscarriage of justice. The case before us, however, has nothing unusual in it and involves a pure question of fact. There is no document in writing in proof of the agreement upon which the plaintiff's case is based and the decision hinges primarily upon appreciation of the oral evidence that has been adduced by the parties. The trial judge, who had the witness before him, was the best person to weigh and appraise their credibility and the conclusion, which he arrived at, have been affirmed in their entirety by the High Court on appeal. In these circumstances, we see no reason whatsoever to go beyond the facts which have been found against the appellant by both the courts below.

As regards the other point, however, we are of the opinion that the decision of the trial court was right and that the High Court took an undoubtedly rigid and technical view in reversing this part of the decree of the Subordinate Judge. It is true that it was no part of the plaintiff's case as made in the plaint that the sum of Rs. 30,000/- was advanced by way of loan to the defendants second party. But it was certainly open to the plaintiff to make an alternative case to that effect and make a prayer in the alternative for a decree for money even if the allegations of the money being paid in pursuance of a contract of sale could not be established by evidence. The fact that such a prayer would have been inconsistent with the other prayer is not really material. A plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. The question, however, arises whether, in the absence of any such alternative case in the plaint it is open to the court to give him relief on that basis. The rule undoubtedly is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the plaintiff could have made, was not only admitted by the defendant in his written statement but was expressly put

(1) (1946) 51 C W.N. 98 (P.C.)

forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes. A demand of the plaintiff based on the defendant's own plea cannot possibly be regarded with surprise by the latter and no question of adducing evidence on these facts would arise when they were expressly admitted by the defendant in his pleadings. In such circumstances, when no injustice can possibly result to the defendant, it may not be proper to drive the plaintiff to a separate suit. As an illustration of this principle, reference may be made to the pronouncement of the Judicial Committee in *Babu Raja Mohan Manucha v. Babu Manzood Ahmad Khan* (1). This appeal arose out of a suit commenced by the plaintiff appellant to enforce a mortgage security. The plea of the defendant was that the mortgage was void. This plea was given effect to by both the lower courts as well as by the Privy Council. But the Privy Council held that it was open in such circumstances to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under section 65 of the Indian Contract Act. Although no such alternative claim was made in the plaint, the Privy Council allowed it to be advanced and gave a decree on the ground that the respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit. It may be noted that this relief was allowed to the appellant even though the appeal was heard *ex parte* in the absence of the respondent.

CIVIL.

1951.

Firm Srinivas
Ram Kumar

v.

Mahabir Prasad

Mukherjee, J

Mr. Harish Chandra appearing for the second party defendants raised the question of interest in connection with the plaintiff's claim for a money decree. His contention is that the plaintiff could not claim any interest so long as he was in possession of the house and he could not also claim any interest after that, as his clients made a tender of the sum of Rs. 30,000/- by sending a hundi for that amount to the plaintiff by registered post on July 12, 1943 which the plaintiff refused to accept. The first part of the contention is undoubtedly correct and is not disputed on behalf of the plaintiff. We feel difficulty, however, in accepting the second part of the contention raised by Mr. Harish Chandra. The receipt of this hundi was totally denied by the plaintiff both in the plaint as well as in the evidence and it is doubtful whether even if the story was true, it could constitute

(1) (1942) L.R. 70 I.A. 1.

CIVIL.

1951.

Firm Srinivas

Ram Kumar

v.

Mahabir Prasad

Mukherjee, J.

a valid tender in law. The defendants undoubtedly had the use of this money all this time and in our opinion the plaintiff is entitled to some interest. The learned Counsel appearing for both the parties, at the close of their arguments, left this question of interest to be determined by us and we think that it would be quite fair if we allow interest on the sum of Rs. 30,000/- at the rate of 4% per annum from the beginning of September 1943. It is admitted that the plaintiff's possession of the house ceased by the end of August 1943.

The result is that we allow the appeal in part; the decree made by the High Court is affirmed in so far as it dismissed the claim for specific performance. The plaintiff, however, will be entitled to a money decree for the sum of Rs. 30,000/- against the defendants second party with interest at 4% per annum from the 1st of September 1943 to the date of realisation. Each party to this appeal will bear his own costs.

S.K.R.C.

Appeal allowed in part.

Present: *Mr. Justice Saiyid Fazl Ali, Mr. Justice Bijan Kumar Mukherjea and Mr. Justice N. Chandrasekhara Aiyar.*

ARJAN SINGH *alias* PURAN

v.

KARTAR SINGH AND OTHERS.*

CIVIL.

1951.

March, 2.

Code of Civil Procedure (Act V of 1908), Order 41 Rule 27—Principle of production of additional evidence in Appellate Court—Finding reached on the basis of additional evidence which ought not to have been admitted, if conclusive in second appeal.

The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in Order 41 Rule 27 of the Civil Procedure Code.

If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence it would be a case of improper exercise of discretion and the additional evidence so brought in the record will have to be ignored and the case decided as if it was non-existent. Under Order 41 Rule 27 it is the Appellate Court that must require the evidence to enable it to pronounce judgment. The true test, therefore, is whether the Appellate Court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

It is no doubt true that a finding of fact, however, erroneous, cannot be challenged in the second appeal, but a finding reached on the basis of an additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves which raised serious doubt about the genuineness, cannot be accepted as a finding that is conclusive in second appeal.

Appeal by the Plaintiff.

Suit for a declaration that a will executed by the first defendant, Inder Singh, in favour of the second defendant, Kartar Singh, was null and void as against the Plaintiff.

The material facts will appear from the judgment.

* Civil Appeal No. 31 of 1950 against the judgment and decree dated 28-2-46 of the Lahore High Court in Regular Second Appeal No. 887 of 1942 (*Din Mohammad and Mohammad Sharif, JJ*) arising out of decree dated 21-2-41 of the Senior Sub-Judge, Jullundur in Suit No. 180 of 1940.

CIVIL.

—

1951.

{

Arjan Singh

v.

Kartar Singh

—

Mr. Ram Lal Anand, Senior Advocate, (Mr. Harbans Lal Mittal, Advocate, with him) instructed by Mr. Ganpat Rai Agent for the Appellant.

Mr. Bakshi Tek Chand, Senior Advocate (Mr. P. S. Safeer, Advocate, with him), instructed by Mr. S. P. Varma, Agent for the Respondents.

The judgment of the Court was delivered by:—

March, 2.

N. Chandrasekhara Aiyar, J.:—The plaintiff, Arjan Singh *alias* Puran, brought a suit in the court of the Subordinate Judge, Jullundur, against Inder Singh, Kartar Singh and five others, for a declaration that a will executed by the first defendant, Inder Singh, in favour of the second defendant, Kartar Singh, about 14 years ago was null and void as against the plaintiff, who was the first defendant's reversionary heir after his death. The plaint comprised a half share of land measuring 395 kanals in the village of Kadduwal, another half share of land measuring 837 kanals and 11 marals in the village of Pattar Kalan, and four houses in the latter village. In the pedigree attached to the plaint showing the relationship of the parties, the plaintiff claims Sehja Singh as his 4th ancestor, Jodha Singh and Jai Singh are shown as Sehja Singh's sons. Defendant No. 1, Inder Singh is Jodha Singh's grandson. It is alleged that the parties are Jat agriculturists governed by the customary law in matters of alienation of ancestral property and succession, and that as a sonless proprietor under this law is not competent to make a will in respect of his ancestral property, when there are collaterals upto the 5th degree, and as the entire property mentioned in the plaint was ancestral, the will made by the first defendant in favour of the second defendant who claimed to have been adopted by the first defendant was invalid and ineffectual. Plaintiff was born on 22-7-1919, and was a minor when the will was made, and so the suit was within time.

The suit was contested mainly by the second defendant, Kartar Singh, who set up his adoption, and pleaded that the properties were not at all ancestral as regards the plaintiff. Defendants 3 to 7 remained *ex parte*.

At the trial, it was admitted that the land situated in Kadduwal was not proved to be ancestral. The Subordinate Judge held that even the land in Pattar Kalan was not shown to be ancestral by the evidence adduced on the side of plaintiff, as it was found that the common ancestor, Sehja Singh, had not only two sons called Jodha Singh and Jai Singh, but a third son named Pohlo, and that from the mere fact that the two sons enjoyed the land in equal shares, no presumption could arise that the property was ancestral and descended by inheritance from the common ancestor, when nothing was known about the share of the third son. He recorded findings in favour of the plaintiff on the issues as to adoption and limitation, but he also held that the plaintiff had no *locus standi* to contest the validity of the adoption as the period of limitation had expired long before he was born. In the result, the suit was dismissed.

CIVIL.

1951.

Arjan Singh

v.

Kartar Singh

Chandrasekhara

Aiyar, J.

The plaintiff preferred an appeal to the court of the District Judge. He filed an application under order 41, rule 27 and section 151 Civil Procedure Code for leave to adduce additional evidence. The document he wanted to be taken on record and considered, and of which it was alleged that he was not aware at the trial, was a *kami-beshi* statement relating to Mauza Pattar Kalan, which contained a note that the third son, Pohlo, gave up his interest in the ancestral property in favour of his brothers. A copy of the statement was filed along with the appeal memorandum. The application was naturally opposed on behalf of the contesting defendants who urged that the plaintiff appellant had ample opportunity to produce all his evidence in the lower court to prove that the property was ancestral and that the entry on which reliance was now sought to be placed appeared on the face of it to be a forged one. The District Judge posted the application to be heard along with the appeal itself. On the 17th March 1942, that is, even before he heard the appeal, the District Judge allowed the application. Referring to the two entries found in the *naqsha kami beshi* prepared in 1849-50 and the *muntakhib asami-war* prepared in 1852, which stated that Pohlo had relinquished his ancestral share, he observed "These two entries taken together, if found genuine, would enable the Court to arrive at a just conclusion. It is, therefore, in the interest of justice that the additional evidence should be let in. I have taken action under order 41, rule 27 (1) (b) of the Civil Procedure Code. This additional evidence would supply mate-

CIVIL.

1951.

Arjan Singh

v.

Kartar Singh

Chandrasekhara

Aiyar, J.

rial to remove the defect pointed out in the judgment of the Court below, why two of the sons of Sehja Singh came to own equal shares of land of Pattar Kalan in the presence of their 3rd brother." He permitted the parties to call evidence relating to the two documents. Two witnesses were examined on the side of the appellant. Munshi Pirthi Nath is the clerk in the D.C.'s office, Jullundur City, and he brought the record of rights for the village Pattar Kalan prepared at the time of the settlement of 1849-50. Munshi Niaz Ahmad is the office Qanungo in the Jullundur Tahsil and he brought the *muntakhib asami-war* of the record of rights preserved at the Tahsil Office. Both of them gave evidence about the relevant entries found in the registers.

The District Judge reversed the decision of the Subordinate Judge and decreed the plaintiff's suit on the strength of this additional evidence. He held that the entries relied on for the appellant were genuine and not forged and that as Pohlo had relinquished his share, the land in Mauza Pattar Kalan was ancestral qua the plaintiff. He further found that the suit was not barred and was within time under article 120 of the Indian Limitation Act, but that the adoption set up by the second defendant was not true. As the custom of the district did not permit a proprietor to will away any portion of his property, whether ancestral or self-acquired, the plaintiff had, in the opinion of the District Judge, a right to contest the will. On the basis of these findings, he decreed the plaintiff's suit in its entirety, including the lands in the village of Kadduwal which were conceded to be non-ancestral and also an area of 4 bighas and 16 biswas of land in Pattar Kalan which, according to the record of rights, was not in the possession of Jodha Singh and Jai Singh, but with third parties.

Kartar Singh, the second defendant, took the matter on second appeal to the High Court. The learned Judges of the High Court held that there was nothing to show that the land in Pattar Kalan was ancestral and that the District Judge was not justified in admitting additional evidence in the shape of the *naqsha kami beshi* and the *muntakhib asami-war* records. They further pointed out that even a superficial observation of the original documents led one irresistibly to the conclusion that the entry regarding Pohlo giving up his share was a subsequent

interpolation. They came to the conclusion, therefore, that the entire land situated in Pattar Kalan was also non-ancestral and that the suit should have been dismissed in toto, inasmuch as under section 7 of Act II of 1920, no person is empowered to contest any alienation of non-ancestral immoveable property on the ground that such alienation is contrary to custom. In view of this finding, no other question arose in the case for decision. Leave was, however, granted to appeal to His Majesty-in-Council and this is how this appeal is now before us.

CIVIL.
—
1951.
Arjan Singh
v
Kartar Singh
—
Chandrasekhara
Aiyar, J

It was strenuously argued by the learned Counsel for the appellant that it was not open to the High Court to interfere with the discretion exercised by the District Judge in allowing additional evidence to be adduced and that even assuming that there was an erroneous finding of fact, it must stand final as a second appeal can be entertained only on the specific grounds mentioned in section 100 of the Civil Procedure Code. There is, however, a fallacy underlying this argument. The discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in order 41, rule 27 of the Civil Procedure Code. If the additional evidence was allowed to be adduced contrary to the principles governing the reception of such evidence, it would be a case of improper exercise of discretion, and the additional evidence so brought on the record will have to be ignored and the case decided as if it was non-existent. Under order 41, rule 27, it is the appellate court that must require the evidence to enable it to pronounce judgment. As laid down by the Privy Council in the well-known case of *Kessowji Issur v. G. I. P. Railway*, (1) "the legitimate occasion for the application of the present rule is when, on examining the evidence *as it stands*, some inherent lacuna or defect becomes apparent, not where a discovery is made, outside the Court, of fresh evidence and the application is made to import it;" and they reiterated this view in stronger terms even in the later case of *Parsotim v. Lal Mohar* (2). The true test, therefore, is whether the appellate court is able to pronounce judgment on the materials before it without taking into consideration the additional evidence sought to be adduced.

(1) (1907) L.R. 34 I.A. 115.

(2) (1931) L.R. 58 I.A. 254.

CIVIL.

1951.

Arjan Singh

v.

Kartar Singh

Chandrasekhara

Aiyar, J.

In the present case, there is nothing to show that there was any lacuna or gap which had to be filled up and that the appellate court felt the need for the omission being supplied so that it could pronounce a judgment; to put it the other way round, it does not appear, and it was not stated, that the District Judge felt himself unable to come to a decision without copies of the settlement registers that were sought to be put in before him for the first time. On the other hand, the District Judge made up his mind to admit the certified copies of the *kami beshi* and *muntakhib asami-war* registers even before he heard the appeal. The order allowing the appellant to call the additional evidence is dated 17-3-1942. The appeal was heard on 24-4-1942. There was thus no examination of the evidence on the record and a decision reached that the evidence as it stood disclosed a lacuna which the Court required to be filled up for pronouncing its judgment. In the circumstances, the learned Judges of the High Court were right in holding that the District Judge was not justified in admitting this evidence under order 41, rule 27.

Even conceding that the reception of additional evidence was proper, the District Judge has failed to consider the inherent infirmities of the entries in the settlement registers relied on for the appellant and the several criticisms that could justly be levelled against them for showing that they were spurious. He took the entries to be genuine. The only reason assigned by the learned Judge for treating the entries to be genuine and not forged appears to be that the records had all along remained in proper custody. As against this rather perfunctory remark, we must set the following observations of the learned Judges of the High Court:

Even a superficial observation of the original documents leads one irresistibly to the conclusion that this entry was a subsequent interpolation. In *naqsha kami beshi* there was already a remark in that column and the remark relied upon which has very awkwardly been inserted there is with a different pen and in a different ink. It is even impossible to read it clearly. Further, although there are 2 or 3 other places where the names of Jodha and Jai Singh appear, no such remark has been made against them. It may also be observed that though a corresponding remark appears in the column of *sharah lagan*

in *muntakhib asami-war* where it is evidently out of place in the copy retained in the Tahsil Office, there is no such remark in the copy which is preserved at the Sadar Office. Even otherwise it does not stand to reason why a remark to this effect should have been made in this column. The way in which these entries were said to have been traced also throws a lot of suspicion on their genuineness.

CIVIL.

1951.

Arjan Singh

v.

Kartar Singh

Chandrasekhara
Aiyar, J.

We find ourselves in entire agreement with these observations of the learned Judges. It is no doubt true that a finding of fact, however erroneous, cannot be challenged in a second appeal, but a finding reached on the basis of additional evidence which ought not to have been admitted and without any consideration whatever of the intrinsic and palpable defects in the nature of the entries themselves which raise serious doubts about their genuineness, cannot be accepted as a finding that is conclusive in second appeal.

If the additional evidence is left out of account, the appellant has practically no legs to stand on. There is nothing to show that the common ancestor Sehja Singh was possessed of the Mauza Pattar Kalan properties which are found subsequently entered in the name of two sons in equal shares, with nothing said about the share of the third son Pohlo. As a matter of fact, the pedigree table shows that there was a fourth son called Hamira. If the property had been entered in the registers in the name of all the sons in equal shares, there might be some ground, however feeble, for presuming that the property was ancestral as alleged by the plaintiff. There is nothing to show that the common ancestor owned the land and that his sons got it from him by inheritance in equal shares.

The District Judge was obviously wrong when he decreed the plaintiff's suit even with reference to the lands in Kadduwal conceded to be non-ancestral and the land in Khasra No. 2408 measuring 4 bighas and 16 biswas, which was not in the possession of the two sons Jodha Singh and Jai Singh. He was equally wrong in holding that the customary law which governed the parties did not permit the owner to will away any portion of the property, whether ancestral or self-acquired; this is contrary to section 7 of Punjab Act II of 1920, which is in these terms:

"Notwithstanding anything to the contrary contained in Section 5, Punjab Laws Act, 1872, no person shall contest any alienation of non-ancestral immovable property or any appointment of an heir to such property on the ground that such alienation or appointment is contrary to custom."

No other point arises in this appeal which fails and is dismissed with costs in all the courts.

CIVIL.

1951.

Arjan Singh

v.

Kartar Singh

Chandrasekhara

Aiyar, J.

S.K.R.C.

Appeal dismissed with costs.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Arthur Trevor Harries, Kt., Chief Justice and
Mr. Justice S. N. Banerjee.*

DUGARMULL KISSENAL

v.

SAMBHU CHARAN PANDEY AND ANOTHER.*

CIVIL.

1951.

February, 13.

Suit on a promissory note—Evidence of an agreement only postponing the time of payment and without making the contract conditional upon certain event, if admissible under proviso 3 of Section 92 of the Indian Evidence Act (I of 1872)—Section 46 of the Negotiable Instruments Act (XXVI of 1881) and Section 92 of the Indian Evidence Act to be read together—An endorsee of a pro-note, if holder in due course under Section 9 of the Negotiable Instruments Act—"Specific place" in Section 69 of the Negotiable Instruments Act, meaning of—Address appearing under a maker's signature or at the top of the document, if forms part of the Contract.

P. brought this suit for recovery of Rs. 2,057-8-0-being the principal and interest due under a promissory note made by D₂ in favour of D₁ and endorsed by the latter in favour of P. The question which was raised in the trial court was whether D₂ as the maker of the note was liable to P. to whom the note had been endorsed by D₁ the promisee. In the written statement D₂ pleaded that P. was not a holder in due course and that the promissory note was made on the condition that the amount thereof would only be payable to the promisee out of moneys, if any, received by the maker as his share of the profits of a firm known as B. Mukherjee & Co., in which the maker and others were interested and which was then being wound up and accounts of which were being taken:

Held that (1) the agreement as in the present case that the amount of the promissory note would only be payable out of certain moneys to be received was only an agreement postponing the time of payment and did not affect the immediate liability to pay which arose on execution of the note.

(2) Section 46 of the Negotiable Instruments Act and Section 92 of the Indian Evidence Act should be read together and a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, is admissible under Proviso 3 of the Section 92.

(3) Evidence of an agreement only postponing the time of payment and without making the contract conditional upon certain event is inadmissible under Proviso 3 of Section 92 of the Indian Evidence Act.

* Appeal from Original Decree No 107 of 1950, against the judgment and decree of Bose, J. sitting on the Original Side; dated 6-4-50.

CIVIL.

1951.

Dungarmull
Kissenlal

.v.

Shambhu Charan
Pandey.

(4) The term 'Holder in due course' is defined in Section 9 of the Negotiable Instruments Act and an endorsee may also be a holder in due course if he is unaware of, any demand which has been made before.

(5) 'Specific place' in Section 69 of the Negotiable Instruments Act means a place so described as would enable the holder of a note to go to it with a reasonable certainty of being able to find the drawer of the note to present the note to him.

(6) An address appearing under a maker's signature or at the top of a document does not form part of the contract.

Appeal by the Plaintiff.

Suit for recovery of money said to be due under a promissory note.

The material facts will appear from the judgment.

Messrs. E. R. Meyer and B. K. Ghosh for the Appellant.

Mr. Samares Sen for the Respondents.

The judgments of the Court were as follows:—

Harries, C. J.:—This is an appeal from a judgment and decree of Bose J. sitting on the Original Side, dated April 6, 1950, by which he dismissed a suit for the recovery of money said to be due under a promissory note.

The plaintiff brought the suit giving rise to this appeal for the recovery of Rs 2,057-8-0 being principal and interest due under a promissory note made by defendant No. 2 in favour of defendant No. 1 and endorsed by the latter in favour of the plaintiff. The suit was filed under or. 37 of the Code of Civil Procedure on July 8, 1946. Defendant No. 1 took no steps to defend the suit, but defendant No. 2 applied for and obtained leave to defend the suit and the only matter before Bose J. was whether defendant No. 2 as the maker of the note was liable to the plaintiff to whom the note had been endorsed by defendant No. 1 the promisee.

In the plaint the plaintiff is described as a firm registered under the Indian Partnership Act and as such was entitled to bring the suit in the name of the firm. In the plaint it is pleaded that defendant No. 2 executed the promissory note in favour of defendant No. 1 the note being said to be for Rs. 2,000/- payable on demand and bearing interest at the rate of six per cent per annum. According to the plaint the note, which was executed on January 7, 1946 was endorsed by the promisee defendant No. 1 in favour of the plaintiff for valuable consideration on April 2, 1946. On May 28, 1946 it is said that the plaintiff demanded payment from defendant No. 2, but the latter refused to pay and notice of dishonour was duly given. The amount due was said to be Rs. 2,057-8-0, being Rs. 2,000/- principal and Rs. 57-8-0 interest. The claim was therefore made against both the defendants for this sum.

In the written statement filed by defendant No. 2 the latter did not admit that the plaintiff was a registered firm and further denied that there was any consideration for the making or for the endorsement of the note. It was further pleaded that the plaintiff was not a holder in due course and that the promissory note was made on the condition that the amount thereof would only be payable to the promisee out of moneys, if any, received by the maker as his share of the profits of a firm known as B. Mukherjee and Company in which the maker and others were interested and which was then being wound up and the accounts of which were being taken. It was pleaded that the accounts of that partnership firm, had not been taken and therefore liability under the note had not yet arisen. The suit was therefore premature. It was pleaded that the plaintiff was aware of the terms and conditions upon which this promissory note was executed and, in the alternative, of the fact that there was no consideration for the making of the promissory note. There was a denial that the plaintiff gave any consideration for the endorsement of the promissory note in his favour. It was stated that the endorsement, if any was obtained by the plaintiff fraudulently and in collusion with the promisee with intent to cause injury to the maker thereof namely, defendant No. 2. Want of presentment was not pleaded but it was pleaded that the plaint disclosed no cause of action. It was later contended that presentation was necessary and as it was not pleaded in the plaint the latter document disclosed no cause of action.

CIVIL.

1951.

Dungarmull
Kissenlalv.
Shambhu Charan
Pandey.

Harries, C.J.

CIVIL.

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

The following issues were framed by the learned Judge:

- (1) Is the plaintiff firm a registered firm?
- (2) Was there consideration for the making or endorsement of the promissory note in suit?
- (3) Was the promissory note made on the terms and conditions as alleged in paragraph 4 of the written statement and had the plaintiff notice thereof? Can such terms and conditions be proved or are they admissible in evidence?
- (4) Is the plaintiff a holder in due course of the Promissory Note?
- (5) Does the plaint disclose any cause of action in the absence of pleading as to presentment of the promissory note to the defendant No. 2?
- (6) To what reliefs, if any, is the plaintiff entitled?

The learned Judge was satisfied that the plaintiff firm was registered and that issue was decided in favour of the plaintiff and no argument has been addressed to us upon that issue. He decided the other issues in favour of the defendant except that he held that the note was given for consideration.

It will be convenient to deal firstly with issue No. 3 namely, whether the promissory note was made on the terms and conditions alleged in paragraph 4 of the written statement and whether the plaintiff had notice of such terms. The question must also be considered whether or not the defendant could adduce evidence to prove the terms and conditions alleged by reason of section 92 of the Indian Evidence Act.

The Promissory note was in these terms:

10A, Shibsankar Mullick Lane, Calcutta.

7th January, 1946.

Rs. 2,000/-

On demand I promise to pay Sambhu Charan Pandey of No. 3 Barada Mitter Lane, Calcutta or order at Calcutta, the sum of rupees two thousand together with interest at the rate of 6% per annum, for value received.

Sd/- Bibhuti Bhusan Mukherjee.

7-1-46.

CIVIL.

1951.

Dungarmull
Kishenlal

v.

Shambhu Charan
Pandey

Haines, C.J.

On the back of the promissory note appears this endorsement "please pay to the Dungarmull Kishenlal or order", and the signature underneath of Sambhu Charan Pandey, and the date, 2-4-46.

In paragraph 4 of the written statement the following plea was taken.

"The said promissory note was further made on the term and condition that the amount thereof would only be payable to the defendant Sambhu Charan Pandey out of the moneys received by this defendant if any as his share of the profits of a firm of the name of B. Mukherjee & Company in which this defendant and certain other persons were partners after the accounts of the said firm had been taken and adjusted between the said partners. The said accounts have not yet been taken or adjusted in spite of the defendants best efforts and no money in respect of this defendant's said share of the profits of the firm of B. Mukherjee & Company has yet been received by or paid to him or in fact ascertained."

By this paragraph it is clear that defendant No. 2 pleaded that this note was given upon a condition, namely that the maker thereof would only be liable under it if moneys were received by the maker as his share of the profits of a certain partnership firm and that such liability would only arise after the accounts had been taken and the profits ascertained. As the accounts had not been taken and the share of the profits had not been ascertained the maker of the note was not liable when the suit was instituted. In short the plea is that the suit was, to say the least of it, premature.

CIVIL.

1951.

Dungarmull
Kissenlal

v.

Shambhu Chaman
Pandey.*Harries, C.J.*

The learned Judge held that this note had been made and given to the promisee upon the terms alleged in paragraph 4 of the written statement. In his view no liability under the note could arise until the partnership accounts had been taken and the share of the profits, if any of the maker of the note had been ascertained. As no such accounts had yet been completed the learned Judge was of opinion that the suit must fail as it was premature.

The plaintiff appellant contended before us that the evidence did not establish that this note had been given upon the terms and conditions alleged. The plaintiff contended that at most the arrangement between the parties merely postponed the time for actual payment. The note, it was argued, created a liability to pay from the moment it was executed and that all that the arrangement between the parties amounted to was an agreement postponing the time for payment.

On May 28, 1946 the attorneys for defendant No. 2 wrote to defendant No. 1 and in this letter the terms of the arrangement between the parties were set out. The attorneys admit that defendant No. 1 performed valuable services in bringing about a settlement between defendant No. 2 and his partners relating to the partnership business of Messrs. B. Mukherjee & Co., According to the letter it was agreed that for such services as well as previous services rendered to the firm of Messrs. B. Mukherjee & Co., with regard to procuring orders for the firm, the attorney's client, namely, defendant No. 2 agreed to pay defendant No. 1 a sum of Rs. 2,000/- as remuneration. In short, it is alleged that there was an agreement to pay an amount for services rendered without any condition whatsoever. This arrangement it is said was made in the month of December 1945. In the letter it is then said that either at the end of December, 1945 or at the beginning of January, 1946 defendant No. 1 wanted to be assured that the sum of Rs. 2,000/- which defendant No. 2 had promised to pay him, would be paid and accordingly it is said, defendant No. 2 executed a promissory note for the sum of Rs. 2,000/- in favour of defendant No. 1.

It is said that when this promissory note was executed it was orally agreed between the parties that the sum of Rs. 2,000/- would be actually paid to defendant No. 1 after the account of

the firm of Messrs. B. Mukherjee & Co., was completed and defendant No. 2 had received his share of the profits thereof. It is to be observed that in this agreement, as set out in the letter, all that is suggested is that the actual payment of the sum due under the note would be postponed until the accounts of the partnership had been taken and defendant No. 2 had received his share of the profits. It is not suggested that liability under the note would only attach when the partnership accounts had been taken and the amount of the profits, if any, of defendant No. 2, had been ascertained.

CIVIL.

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

It is then stated in the letter that defendant No. 1 had represented that he was in serious financial difficulty and that in consequence a sum of Rs. 625/- had been paid by defendant No. 2 to defendant No. 1 "in part satisfaction of the said sum of Rs. 2,000/- only."

The letter then goes on to state that the accounts of the firm of Messrs. B. Mukherjee & Co., had not been taken owing to the dilatory tactics of the managing partner and further that such adjustment of accounts were not likely to be completed without the intervention of the Court. It is then stated that defendant No. 1 had, sometime in March, 1946 agreed to procure a loan of Rs. 5,000/- for defendant No. 2, and had been paid a sum of Rs. 125/- as commission in advance. But defendant No. 1 had failed to secure any loan. The attorney therefore requested defendant No. 1 to return the promissory note for Rs. 2,000/- together with the sums of Rs. 625/- and Rs. 125/- and the letter concludes with this statement:

"It is needless for me to say that my client will pay you the said sum of Rs. 2,000/- out of his share of profits of the said firm of Messrs. B. Mukherjee & Company as and when he would receive the same."

Strange to say, on the same day, namely, May 28, 1946 the attorneys for the plaintiff wrote to defendant No. 2 demanding the sum of Rs. 2,000/- with interest due on the promissory note executed by defendant No. 2 in favour of defendant No. 1 which had been endorsed in favour of the plaintiff.

CIVIL.

1951.

Dungaimull
Kissenlal

v.

Shambhu Charan
Pandey.

Haries, C.J.

On May 31, 1946 the attorneys for defendant No. 2 replied to the letter of May 28, 1946 written by the plaintiff's attorneys. In this letter it is stated that the note for Rs. 2,000/- was not given for valuable consideration. The attorneys also asked the plaintiff's attorneys as to the nature of consideration given by the plaintiff when the note was endorsed in their favour. It is to be noticed that in the earlier letter of May 28, 1946 it was admitted that the note was given for valuable consideration, namely as remuneration for service rendered.

If the issue had to be decided on the correspondence I would have no hesitation in holding that the oral agreement between Defendants Nos. 1 and 2 merely related to time for payment of what was due on the note; in short, that it related to the discharge of the liability under the note and not to the existence of liability under the note.

The parties however gave evidence and it will be necessary to consider this evidence. The onus of establishing this agreement clearly rested on defendant No. 2 but it is to be observed that the plaintiff first gave evidence.

It was not suggested that the plaintiffs witness Dungarmull Jhunhunwalla was present when this agreement was made between defendants Nos. 1 and 2. But it was suggested to him that he was aware of the conditions upon which this promissory note was executed. The only cross-examination of this witness was a suggestion that he was aware of the fact stated in paragraph 4 of the written statement. It will be convenient to set out the relevant question and answers:

248. Q. I am suggesting to you that you were aware of the facts stated in para 4 of the written statement at the time when you advanced the moneys?

A. I do not agree. This was not known to me.

280. Q. That the promissory note was executed under the circumstances mentioned in para 4 of the written statement?

A. I do not know anything about that. I do not know the circumstances mentioned in para 4 of the written statement.

CIVIL

1951.

281. Q. That you have filed a suit in collusion and conspiracy with Sisir Kumar Mitra and Sambhu Pandey?

Dungarmull
Kissenlal

v.

Shambhu Charan
Pandey.

A. I do not agree.

Harries, C.J.

These were the only suggestions made to the plaintiff who obviously had no personal knowledge of the alleged agreement.

Defendant No. 2 gave evidence and he gave the following account of what occurred between him and defendant No. 1 when the note was executed.

17. Q. * * * Will you please tell my Lord the facts leading to the execution of the promissory note executed by you on the 7th of January 1946?

A. When as a result of these attempts at an amicable settlement a consent decree was passed in this Court Sambhu Charan Pandey represented to me that he had done a lot for us both in the suit and before that, so that he expected to be remunerated. It was arranged thereafter that he would be paid a sum of Rs. 2,000/- He asked for that amount and I said that I would not be in a position to pay the amount in cash because the amount was lying in the accounts of the firm. I said that I would write out something to show that this money was being given. He said that that would not do and I would have to write a promissory note. Thereupon Summermull Chowdhury and my partner Sisir Kumar Mitra both insisted that I should execute such a promissory note. As there was no danger in doing so because the money was already in their own account and the suit was settled, I accordingly executed the promissory note."

If the matter had rested there I should have no difficulty in holding that the agreement, if any, merely related to the time

CIVIL.
 —
 1951.
 {
 Dungarmull
 Kissenlal
 v.
 Shambhu Charan
 Pandey.
 —
Harries, C.J.

for payment. It was merely an arrangement postponing the time for the discharge of the liability created under the note. There is nothing in the answer which would suggest that there was to be no liability until the profits had been received by the maker of the note. Defendant No. 2 states that the arrangement was for the payment of Rs. 2,000/- and that the note was executed to secure such payment. Putting his answer at its highest in his favour it only amounts to this that there was some nebulous arrangement that payment would not be made immediately.

It is quite clear that Counsel for defendant No. 2 was not satisfied with this answer and he immediately asked the following question:

"18. Q. Please tell My Lord exact agreement between you and Sambhu Charan Pandey regarding the promissory note and the payment of the monies agreed to be paid to Sambhu Charan Pandey?

A. It was agreed between us that after the final settlement of our accounts, Sambhu Charan Pandey would be paid a sum of Rs. 2,000/- out of the share of my profits which was lying in those accounts."

The subsequent answer was very different from the account which he had given immediately before and this answer was only given when Counsel suggested to him that he should give the precise terms of the agreement. When he did not realise that he was giving the terms of the agreement, his version was very different and I find it very difficult to believe the latter version which he gave having regard to the earlier version. Further this latter version is not the version given by his attorney who set out in the letter of May, 28, 1946, the terms of the alleged agreement.

Later defendant No. 2 was cross-examined and he had to admit that he had paid a sum of Rs. 625/- in respect of this promissory note. The admission of such a payment also appears to be wholly inconsistent with the version of the agreement now set out in paragraph 4 of the written statement. If there was to be no liability under the note until the profits, if any of defendant

No. 2 in the partnership firm had been ascertained, how came it that defendant No. 2 paid a sum of Rs. 625/- on account of this note? Had the partnership accounts disclosed no profit, there would be no liability under the note, according to defendant No. 2. Yet he paid Rs. 625/- on account before it had been ascertained whether he was liable to the plaintiff for any sum whatsoever.

CIVIL.
—
1951.
Dungarmull
Kissenlal
v.
Shambhu Charan
Pandey.

The learned Judge was of opinion that when this note was executed by defendant No. 2 in favour of defendant No. 1 there was an oral agreement postponing the existence of the liability under the note. In his view the agreement was to the effect that no liability under the note would arise until the partnership accounts had been taken and the share of defendant No. 2, if any, in the profits ascertained or paid to him.

Harries, C.J.

In my view the evidence does not establish such an agreement. The first version of the agreement given by defendant No. 2 made it clear that liability under the note was not to be conditional upon the ascertainment of the amount of profits on taking the partnership account. Defendant No. 2 admitted liability and agreed to pay. The promissory note was merely executed because he was not in a position to pay immediately. Further that is the version of the arrangement given by the attorney of defendant No. 2 in the letter of May 28, 1946. In face of the earlier statement of defendant No. 2 and the statements contained in this letter I find it impossible to accept the later version of defendant No. 2 that liability under this note was conditional upon the ascertainment of profits on taking the account of the partnership firm of Messrs. B. Mukherjee & Co. For these reasons I am unable therefore to agree with the finding of the learned Judge and I would hold that the agreement at most was only an agreement postponing the time of payment and did not affect the immediate liability which arose on execution of the note.

It was contended on behalf of the plaintiff appellant that evidence relating to the agreement alleged was inadmissible. But the learned Judge ruled that such evidence was admissible by reason of proviso 3 to section 92 of the Indian Evidence Act. The learned Judge pointed out that it was clear from section 46 of the Negotiable Instruments Act that as between parties to the

CIVIL.

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

note and any holder of the instrument other than a holder in due course, it could be shown that a negotiable instrument was delivered conditionally or for a special purpose only. But he rightly pointed out that section 46 of the Negotiable Instruments Act and section 92 of the Indian Evidence Act should be read together. If the agreement alleged by defendant No. 2 amounted to postponing liability under the note until the performance of the condition, then evidence of such agreement would I think be admissible under proviso 3 to section 92 of the Indian Evidence Act. If on the other hand the agreement only amounted to an arrangement for payment and did not affect the liability under the note then evidence of such agreement could not be given as it would be evidence of an agreement contrary to the agreement of the parties as evidenced by the note itself. It is to be observed that in the note it is stated that the sum was payable on demand and any agreement postponing payment would be in direct conflict with the terms of the note.

Whether parties to a note payable on demand can enter into an oral agreement contrary to the terms of the contract contained in the note was considered by Sale J. of this Court in the case of *Ramjibun Serowgy v. Oghore Nath Chatterjee* (1). In that case the promissory note was payable on demand. But it was pleaded that the note was executed on the following terms:—

“That in the year 1895 a settlement of accounts was come to between the plaintiff and the defendant, and it was thereupon agreed between them that the said hundis should be cancelled, and that the defendant should pay the plaintiff the sum of Rs. 4,000/- in cash and give him a promissory note for the sum of Rs. 7,000/- in full discharge of all his claims against the defendant in respect of the said hundis and of all other claims against the defendant up to that; and it was further agreed between the plaintiff and the defendant that the plaintiff should not bring any suit to enforce payment of the said promissory note until the defendants share in the compensation money awarded in the Land Acquisition Case No. 181 of 1892 in the Court of the District Judge of 24 parganas should be received by him.”

The question which the learned Judge had to decide was whether evidence in proof of this alleged contemporaneous oral

(1) (1897) I.L.R. 25 Cal. 401.

agreement was admissible having regard to the terms of section 92 of the Indian Evidence Act. The learned Judge held that such evidence was not admissible. At page 403 he observed:

"The oral agreement which is set up in the 4th paragraph of the written statement, and which is sought to be proved for the purpose of limiting the defendants' liability under the promissory note, must, it seems to me, be read in one of two ways. Either it must be read in the literal sense of the words, as constituting an undertaking on the part of the plaintiff not to enforce the note by suit until the happening of a certain event or else it must be read as meaning that the legal obligation of payment was to be postponed to, or made conditional upon, the happening of a certain event. In whichever sense the words are read, the agreement appears to me to have the effect of varying the terms of the contract as contained in the promissory note, and I think the result is the same whether the section be read in the light of the English cases which have been cited, or whether it be construed apart from those authorities."

Upon the promissory note the engagement is an absolute engagement to pay on demand. The defendant seeks to set up a contemporaneous oral agreement, the effect of which is to qualify or restrict that engagement."

Later the learned Judge observed:

"I do not think that it was intended by proviso 3 (section 92 of the Indian Evidence Act) to permit the terms of a written contract to be varied by a contemporaneous oral agreement; but having regard to the illustrations (b) and (j), I think the proper meaning of proviso 3 is that a contemporaneous oral agreement to the effect that a written contract was to be of no force or effect at all, and that it was to impose no obligation at all until the happening of a certain event, may be proved."

This case decided by Sale J. was referred to with approval by Lord Wright in the case of *Rowland Ady v. Administrator General of Burma* (1). In that case their Lordships of the Privy

(1) [1938] A.I.R. P.C. 198

CIVIL.

1951.

Dungarmull

Kis-enlal

v.

Shambhu Chavan
Pandey.

Harries, C J

CIVIL.

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

Council laid down that it was necessary to distinguish a collateral agreement which altered the legal effect of an instrument from an agreement that an instrument should not be an effective instrument until some condition was fulfilled; or, to put it in another form, it was necessary to distinguish an agreement in defeasance of a contract from an agreement suspending the coming into force of the contract contained in the promissory note. Their Lordships of the Privy Council held that where a promissory note was, by its express terms, payable on demand, that is at once the obligation under the note attached immediately. A collateral oral agreement not to make demand until certain specified condition was fulfilled had the intention and effect of suspending the coming into force of that obligation, which was the contract contained in the promissory note. Such an oral agreement constituted a condition precedent to the attaching of the obligation and was within the terms of proviso 3 to section 92.

On the facts of the case their Lordships of the Privy Council held that by the terms of the oral agreement no liability under the note could arise until the happening of an event. That being so, the case fell within proviso 3 to section 92 of the Indian Evidence Act. Their Lordships however made it clear that unless the agreement had the effect of making the liability conditional upon the happening of an event proof of an oral agreement at variance with the terms of the note would not be permitted. At page 202 Lord Wright observed:

"A case like the present is to be distinguished from that dealt with in *Ramjibun Serowgy v. Oghore Nath Chatterjee* (1) in which the promissory note, though absolute in its terms, was said to be subject to an oral agreement, providing that it was not to be enforceable by suit until the happening of a particular event. Sale J. in rejecting this evidence expressed his opinion that the proper meaning of proviso 3 was that the contemporaneous oral agreement to be admissible must be to the effect that a written contract was to be of no force at all and was to constitute no obligation until the happening of a certain event. This description in their Lordships' judgment applies to the present case. To the same effect Page, J. in *Walter Mitchell v. A. K. Tennent* (2), held that the collateral agree-

(1) (1897) I L.R. 25 Calc. 401.

(2) (1925) I.L.R. 52 Calc. 677.

ment alleged in that case constituted a condition precedent to the attachment of any obligation under the cheques in question so that they remained inoperative until the condition was fulfilled."

CIVIL.

1951.

Dungarmull

Kissental

V.

Shambhu Charan

Pandey.

Harries, C.J.

A similar view to that taken by Sale J. was taken by a Bench of the Bombay High Court in *Vishnu Ramchandra Joshi v. Ganesh Krishna Sathe* (1), in which it was held that in a suit on a promissory note payable on demand no evidence could be allowed to prove a contemporaneous oral agreement whereby the plaintiff was said to have agreed that he would not present the note until he had discharged certain incumbrances on a property he had sold to a third party. Such an agreement could not be brought within the terms of proviso 3 to section 92 of the Indian Evidence Act.

Holding as I do that a contemporaneous oral agreement alleged in paragraph 4 of the written statement in the present case merely postponed the time for payment and did not make the liability of the maker of the note conditional upon the results of the partnership account, I am bound to hold that the evidence adduced as to this condition was inadmissible and was therefore wrongly admitted by the learned Judge. The note therefore must be regarded as a note payable on demand at Calcutta.

Even if the evidence tendered to establish this agreement was admissible, nevertheless the defendant No. 2 could not rely upon such agreement as against the plaintiff. As I have already stated, section 46 of the Negotiable Instruments Act would make an agreement rendering liability conditional on the happening of an event binding between the parties to the note and any holder of the instrument other than a holder in due course. But in my view the plaintiff in this case was a holder in due course and had no notice of this alleged agreement. It was contended that the plaintiff was not a holder in due course. But in my view he was such a holder and I shall consider this point later. Being a holder in due course he would not be bound by the terms of any such agreement unless he had knowledge of it when the note was endorsed to him.

As I have already stated it was put to the plaintiff's witness

(1) (1921) I.L.R. 45 Bom. 1155.

CIVIL

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Haries, C J.

that he had knowledge of this arrangement when the note was endorsed. But the witness denied any such knowledge. The learned Judge however held that he had knowledge and clearly the onus was upon the defendant No. 2, if the plaintiff was a holder in due course. Defendant No. 2 gave no direct evidence that the plaintiff had knowledge. According to his evidence the arrangement pleaded in paragraph 4 of the written statement was made between defendant No. 2 and defendant No. 1 in the presence of Sumermull Chowdhury and Sisir Kumar Mitra and there is no suggestion at all that the plaintiff was present. However Sumermull was a relation of the plaintiff and the learned Judge appears to have assumed that because Sumermull knew of the arrangement he must have informed the plaintiff. The plaintiff admitted that he had taken the note from defendant No. 1 and paid the latter Rs. 2,000/- on the suggestion of Sumermull and from that fact the learned Judge seems to have assumed that the plaintiff must have known of the agreement. It appears to me that from those facts it could not be inferred that the plaintiff must have been aware of the agreement. If he was a holder in due course the defendant would have to prove that the plaintiff knew of the agreement and it would not be sufficient for the Court to suspect that he must have known. Suspicion is not proof. It is true that the court might hold that the plaintiff knew of the agreement though no direct evidence that the plaintiff had been told of such an agreement was forthcoming. If circumstances were established from which it would be inferred that the plaintiff must have known of the agreement then the Court could hold that he did know. However I do not think that any court could hold that the plaintiff must have known of this agreement merely from the fact that Sumermull Chowdhury knew of it and that the plaintiff had paid a sum of money for this note to defendant No. 1 at the instigation of Sumermull. It might be that Sumermull wished defendant No. 1 to have the Rs. 2,000/- and he might well have suppressed this agreement in order to induce the plaintiff to take the note and advance the sum of Rs. 2,000/-. At most the Court might suspect that the plaintiff knew. But it appears to me that it was not established that the plaintiff was aware of this condition when he paid Rs. 2,000/- to defendant No. 1 and accepted the note endorsed in his favour. That being so, it appears to me that even if the alleged oral agreement was as alleged by defend-

ant No. 2, it could not be pleaded in defence to the plaintiff's claim as the latter was a holder in due course.

CIVIL.

1951.

Dungarmull
Kissénlal

v.

Shambhu Charan
Pandey.

Harries, C.J.

I shall now deal with issue No. 2 as to whether there was consideration for the making and endorsement of the note in question. It seems to me quite clear from the evidence of defendant No. 2 and from the terms of the letter of defendant No. 2's attorney, dated May 28, 1946 that this note was executed for consideration. Defendant No. 1 had performed useful services for defendant No. 2 and for the firm of which defendant No. 2 was a partner. The note was given in consideration of those services. The performing of services can be consideration for such a note and it was not seriously suggested that the note was without consideration. It is true that in a later letter dated May 31, 1946 the attorney for defendant No. 2 suggested that the note was not for valuable consideration. But having regard to the evidence it must be held that defendant No. 1 gave consideration for the note and that was the view of the learned Judge.

The learned Judge however held that the plaintiff gave no consideration to defendant No. 1 when the note was endorsed by the latter.

I think it is clear that the onus of proving want of consideration rested on the defendant. Section 118 of the Negotiable Instruments Act provides that until the contrary is proved the following presumptions shall be made:

"(a) that every negotiable instrument was made or drawn for consideration, and that every such instrument, when it has been accepted, indorsed, negotiated or transferred, was accepted, indorsed, negotiated or transferred for consideration."

The presumption therefore was in favour of the plaintiffs and this presumption would have to be rebutted by defendant No. 2. The learned Judge held that the presumption had been rebutted. But in my view there was no material upon which he could so hold.

The plaintiff's witness in evidence stated that he paid a sum

CIVIL. of Rs. 2,000/- to Sambhu Charan Pandey for this note. He
 ——— stated that the transaction had been brought about by Sumermull
 1951. Chowdhury to whom he was related. Sumermull Chowdhury
 ~~~~~ and defendant No. 2 were friendly and the plaintiff stated that  
 Dungarmull he advanced the money to defendant No. 1 at Sumermull's  
 Kissenlal request and recommendation. The plaintiff admitted that he  
 v. knew very little about defendant No. 1, but Sumermull had  
 Shambhu Charan told him that defendant No. 1 was an honest person to whom  
 Pandey. money could be safely advanced.  
 ———  
*Harries, C.J.*

The learned Judge was not prepared to accept the plaintiff's evidence and came to the conclusion that no money could have been paid by the plaintiff firm to defendant No. 1. The plaintiff's witness however produced the firm's books and the book showed that a sum of Rs. 2,000/- had been paid to defendant No. 1 on the day the note was executed. The plaintiff's witness was asked questions as to the denomination of the notes which he paid to Sambhu Charan Pandey. But he was unable to give the denomination. From this the learned Judge inferred that his evidence could not possibly be true. It is to be observed that the learned Judge does not in terms hold that the books produced were forgeries. But I think that is implied in his finding.

It was common ground that in the year 1946 the plaintiff had lent defendant No. 2 a sum of Rs. 5,000/- and he was questioned in cross-examination about this transaction. He was asked how the money was lent and he stated that his books would show. The books were referred to and the books showed that a sum of Rs. 5,000/- had been advanced to defendant No. 2 in cash and this loan was admitted by defendant No. 2. In short, the only attempt made by defendant No. 2 to question these books showed that the books were properly kept and accurate. That being so, it is somewhat difficult to understand how the learned Judge could reject the entry relating to the payment of Rs. 2,000/- to defendant No. 1 as recorded in the books.

The books were admitted in evidence and were on the record and we have examined them. It was not suggested that there was anything suspicious on the face of these books. They appear to have been properly kept and the entry relating to the payment of Rs. 2,000/- to defendant No. 1 appears not at the bottom of a page where possibly it could have been interpolated

later, but it appears at the head of a page where it could not have been interpolated. Of course the whole of the book may have been forged. But as I have said the books were certainly accurate with regard to the advance of Rs. 5,000/- to defendant No. 2, I do not think that the learned Judge was entitled to reject these books as forgeries merely because he was not satisfied that the plaintiff had made sufficient enquiries about the financial stability of defendant No. 1 and further could not remember the denomination of the notes handed over to defendant No. 1.

CIVIL.

1951.

Dungarmull  
Kissenlal

v.

Shambhu Charan  
Pandey.

Harries, C.J.

It must be remembered that the plaintiff was giving evidence four years or more after the transaction and it would not be strange that he could not remember the denomination of the notes and that he could not give any detailed particulars of the transaction without reference to his books. Further it appears to me that if Sumermull Chowdhury recommended this loan the plaintiff might well have advanced the money to defendant No. 1. He was related to Sumermull Chowdhury and apparently relied upon his judgment in other transactions, if his evidence is to be believed. Further it is quite clear that Sumermull Chowdhury was a friend of defendant No. 1 because it is the evidence of defendant No. 1 that Sumermull Chowdhury was present when the arrangement was made between defendant No. 2 and defendant No. 1 relating to the payment of the note. The plaintiff might well have accepted the assurance of Sumermull Chowdhury and advanced this money. The note was endorsed to him and the money was recoverable not only from defendant No. 1 but from defendant No. 2, the maker of the note. The onus, as I have said, for showing that there was no consideration for this note rested on defendant No. 2. Even if the evidence of the plaintiff was not accepted that in itself would not discharge the onus. The onus could be discharged by proof of circumstances from which it could be inferred that there was no consideration. But no such circumstances were established from which such an inference would inevitably have to be drawn. Defendant No. 2 could of course give no direct evidence and all that can be said is that the learned Judge appears to have thought that the evidence of the plaintiff's witness corroborated by his books could not be accepted. I do not think that in such circumstances the learned Judge could possibly hold that there was no consideration

CIVIL.

1951.

Dungarmull  
Kissenlal

v.

Shambhu Charan  
Pandey.

Harries, C J.

for this note. Defendant No. 2 in my view did not discharge the onus which the law placed upon him and further I can see no grounds for rejecting the plaintiff's testimony that he paid Rs. 2,000/- for this note, as his evidence is corroborated by his books of accounts which were strictly proved. As I have said, there is nothing suspicious in these books and when they were tested in cross-examination they were found to be strictly accurate in that they correctly recorded an advance of Rs. 5,000/- to defendant No. 2 himself.

The learned Judge came to the conclusion that the plaintiff was not a holder in due course as he had given no consideration for this note when it was endorsed to him. I have already held that the plaintiff gave consideration for the note or that it must be presumed that he did, and further that he had no notice of the agreement pleaded in paragraph 4 of the written statement.

Mr. Sen on behalf of the defendant No. 2 however contended that in spite of these findings it could not be held that the plaintiff was a holder in due course. That term is defined in section 9 of the Negotiable Instruments Act in these words:

“ ‘Holder in due course’ means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or indorsee thereof, if payable to order, before the amount mentioned in it became payable, and without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title ”

The endorsement on the note read: “ Please pay to Dungarmull Kishenlal or order.” Mr. Sen contended that as a result of the definition the plaintiff could not be a holder in due course because he became an endorsee after the amount mentioned in the note had become payable. The note is payable on demand and liability on such a note arises immediately and the amount becomes payable immediately the note is executed. Proof of demand is not necessary and therefore Mr. Sen contends that having become an endorsee of this note after the amount mentioned in it had become payable he could not be a holder in due course.

If we accede to this argument then no endorsee of a promissory note payable on demand can ever be a holder in due course. If the definition is construed literally that might be so. But it has been held in this Court and elsewhere that a note payable on demand can be endorsed to a person who will be a holder in due course until demand is made for payment of the sum due under the note. In fact it has been held that even if a demand has been made an endorsee may yet be a holder in due course if he was unaware of the fact of such a demand.

CIVIL.  
—  
1951.  
Dungarmull  
Kissenlal  
v.  
Shambhu Charan  
Pandey.  
—  
HARRIS, C.J.

It was also suggested by Mr. Sen that the plaintiff had sufficient cause to believe that defendant No. 1 who endorsed the note had no title. He pointed out that according to Indian Law the endorsee must exercise due diligence when accepting an endorsement of this kind. We are satisfied that the plaintiff did not pay a sum of Rs. 2,000/- until he was satisfied by the assurance of his relative Sumermull Chowdhury that the defendant was an honest man to whom money could be safely advanced. That being so, I do not think that it can be possibly argued that the plaintiff was not a holder in due course by reason of the fact that the note was endorsed to him after the amount stated had become payable or on the ground that he had sufficient cause to believe that there was a defect in the title of defendant No. 1.

It was contended before the trial court and again urged before us that the plaintiff disclosed no cause of action because presentment of the note had not been pleaded. It was urged that on the face of it the note was payable at a specific place and therefore the presentment of the note had to be proved before a suit could be brought.

The note recorded a promise to pay defendant No. 1 or order at Calcutta and that, it is said, is a note payable at a specific place and therefore must be presented for payment at the place by reason of section 69 of the Negotiable Instruments Act. Section 69 of the Negotiable Instruments Act is in these terms:

“A promissory note, or bill of exchange, made, drawn or accepted payable at a specified place must, in order to charge the maker or drawer thereof, be presented for payment at the place.”



CIVIL.

1951.

Dungarmull  
Kissenlal

v.

Shambhu Charan  
Pandey.

Harries, C.J.

If this note was payable at a specified place, presentation for payment at that place was a condition precedent and such would have to be pleaded and proved. There was a pleading of presentment and there was no proof.

The learned Judge was of opinion that this was a note payable at a specified place and as there was no pleading or proof of presentation, the plaint disclosed no cause of action.

The plaintiff however contended that the note was not payable at a specified place. He urged that Calcutta a huge city with a population of between four and six million could never be regarded as a specified place and so to regard it would reduce presentation to an absurdity.

Section 69 lays down that where a promissory note is made payable at a specified place the note must be presented for payment at the place. That presupposes that the place is defined with sufficient particularity to enable the holder of the note to go to that place and to present it for payment. If the city of Calcutta be a specified place, how could the holder of a note, who did not know much about the maker or drawer of it, ever hope to be able to present it? In India certain names are extremely common and finding a small business man of the name, for example, of Agarwalls in Burrabazar would be practically an impossibility. Looking for such a person in a comparatively small business area of the city would be very much like looking for a pin in the proverbial haystack. Searching out such a person in this huge city would frequently present an utterly impossible task.

Did the legislature, when it enacted section 69 of the Negotiable Instruments Act, have in contemplation a large town or city or some defined area, or did it have in mind some place described with such particularity as would enable the holder of a note to go to such a place and present it? In my view the phrase "specified place" cannot be used to cover a town or a city. But it is a phrase intended to mean a place so described as would enable the holder of a note to go to it with a reasonable certainty of being able to find the drawer of the note to present the note to him. Where the note is payable in a large city, it

appears to me that presentation to the maker or drawer might be utterly impossible and therefore it could never be the intention of the legislature that a large city or town or area should be regarded as a specified place.

CIVIL.

1951.

Dungarmull  
Kissenlal

v.

Shambhu Charan  
Pandey.

Harries, C.J.

The English word "place" bears a very large number of meanings. Any defined area is a place and indeed an area might be a place where the boundaries are ill-defined. It is quite correct to describe a valley as a beautiful place or a cold place, though the precise limits of such a valley may not be well-defined. Any beauty spot may be described as a beautiful place, though the limits of such a spot may be ill-defined. A town or city can also be described as a place and so can any residence. The word "place" is used commonly in English to denote a country residence. A person may be said to have a place in the country and there the "place" means a country house. The word has a very large number of meanings and therefore it is very difficult to state what meaning was in the mind of the legislature. The word "place" however is qualified with the word "specified" and that suggests a place that can be ascertained with certainty. The city of Calcutta of course is a place which can be ascertained, but the whole purpose of the section was to ensure presentment of the bill to the maker. That being so it appears to me that no place is a specified place within the meaning of section 69 of the Negotiable Instruments Act unless the place is so described as to enable the holder of a note with reasonable certainty to go to that place and be able to find or search out the maker or drawer of the note and present it to him for payment.

In the English Statute the words used are "particular place." But there is a somewhat surprising want of authority in England as to the precise meaning of the phrase.

Payable at Calcutta means at most payable somewhere or anywhere in the City. A note payable somewhere or anywhere in a large town or area cannot truly be said to be payable at a specified place.

In India there is a conflict of authority as to the meaning of the phrase "specified place." There appears to be only one decision of this Court and that is a decision of a single Judge in

CIVIL.

1951.

Dungaimull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

the case of *Shankar Lal Mulchand v. Narayan Chandra Mullick* (1). In that case, McNair J. held that an instrument made payable at Calcutta must be presented for payment in order to make the maker liable thereon, as it was an instrument payable at a specified place requiring presentment under section 69 of the Negotiable Instruments Act. This decision of course is not binding upon us. But the learned Judge followed a Bench decision of the Lahore High Court and held that a note payable at Calcutta was a note payable at a specified place.

The Lahore Bench decision is *Mohammad Ismail Maula Bakhsh v. Abdul Majid Khan* (2). In that case a promissory note was payable on demand at Lyallpur which was a town of considerable importance and size in the Punjab. The Bench held that a city, town or village, at large might be taken to be a specified place within the meaning of sections 64 and 69 of the Negotiable Instruments Act, but presentment of the promissory note there would only be necessary or reasonably possible, if the maker had a residence or place of business there, or was found to be personally present there. The maker of the note in that case did not reside at Lyallpur, nor had he a place of business there, nor was he actually present at Lyallpur on December 8, 1931 when a notice of demand was sent by post by the plaintiff addressed to the defendant at the house of his sister at Lyallpur. In those circumstances the Bench held that though presentment was necessary by reason of section 69 it was impossible in the circumstances and therefore proof of presentment could be dispensed with. It is to be observed that single Judge of the Lahore High Court had taken a different view. In the case of *Mehr Bakhsh v. Hari Chand* (3), Beckett J. had held that if there is to be presentment in the ordinary sense of the word, there must be some quite definite place where the holder of the note can attend with a reasonable chance of finding the maker of the note. In other words, the place specified for payment must be equivalent to what would be called in ordinary language an address which would enable the maker to be found by the exercise of reasonable diligence, provided that the holder himself chooses to attend at the place named for payment. Whether the place named for payment in a negotiable instrument constitutes specified place for this purpose, must be question to be decided according to the circumstances of each case.

(1) (1942) 47 C.W.N. 658

(2) (1936) I.L.R. 18 Lah. 580.

(3) [1935] A.I.R. Lah. 623

The Bench in the case of *Mohammad Ismail Maula Bakhsh v. Abdul Majid Khan* (1), dissented from the view of Beckett J.

CIVIL.

1951.

In an earlier case *Shiv Nath v. Bishambar Das* (2), Abdul Rashid J. had held that presentment of a promissory note payable at Lahore was not necessary. But he rested his decision on a different ground. This single Judge decision was also overruled by the Bench decision to which I have made reference.

Dungarmull

Kissenlal

v.

Shambhu Chaman

Pandey.

Harries, C.J.

The question which we have to consider is whether the Bench decision of Lahore should be followed. It is of course not binding on us, but the opinion of the distinguished Judges who decided that case is entitled to very great respect. In my view however the decision should not be followed. The learned Judges appear to have been impressed by the rule applicable in the United States of America. That rule is stated in these terms:

"Where a bill or note merely designates a particular city at large as the place of payment, without naming any particular place therein, the paper should be presented in such city at the residence or place of business of the maker, if he has any, or upon him personally, if he can be found, but if he has no residence or place of business there and is not found after the exercise of reasonable diligence, having the paper in such city on the day it becomes due is a sufficient presentment."

It is to be observed that the Indian Act makes provision for presentation of instruments which are not payable at a specified place. Section 70 provides:

"A promissory note or bill of exchange not made payable as mentioned in sections 68 and 69, must be presented for payment at the place of business (if any), or at the usual residence, of the maker, drawee or acceptor thereof, as the case may be."

The American rule which the learned Judges of the Lahore High Court have applied to India would require a promissory

(1) (1936) I.L.R. 18 Lah. 580.

(2) (1934) A.I.R., [1935] Lah. 153.

CIVIL.

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

note made payable at a specified place to be presented for payment at the place of business, if any, of the maker or at his residence. In fact the requirements would be very similar whether the promissory note was made payable at a specified place or not. The only difference would be that if it was made payable at a specified place the holder of the note would be required to go to that place even if the maker or drawer had no place of business or residence there and look for him when the note became due, a task which might well be hopeless. It appears to me that in framing section 69 of the Negotiable Instruments Act the legislature intended something different from section 70: where no place is specified for payment then there should be presentment at the maker's place of business or his usual residence. However where a specified place is mentioned, which of course may be neither the place of business nor the residence of the maker then it must be presented at that place. For example, the maker of a note may have business premises in Chowringhee and may reside in Circular Road. However if he makes a note payable at the Imperial Bank, Strand Road, Calcutta, then such a note could not be presented at his business premises in Chowringhee or his residence in Circular Road. It would have to be presented at the Imperial Bank, Strand Road. It is such a place as the Imperial Bank, Strand Road, that the legislature contemplated when they used the phrase "payable at specified place." It is a place which might be his business address or might be his residence, but it might be some other place. It must however be a place which is described with such particularity as would enable the holder of the note to go to that place and search out the maker of the note if he were present. In my view the Bench decision of the Lahore High Court should not be followed and the correct interpretation of this phrase was that given by Beckett J. in the case of *Mehr Bakhsh v. Hari Chand* (1), which I have cited. Any other construction would render it necessary for the holder of a note to come to the city, with frequently no hope whatsoever of being able to find the maker of the note, and to present it for payment. The Bench at Lahore has to admit that if a city be a specified place within section 69, presentation might frequently become impossible and would therefore have to be dispensed with. I find it difficult to believe that such a possibility was in the mind of the legislature when the phrase "specified place" was used.

(1) [1935] A.I.R. Lah. 623.

It was contended in the alternative that this note was made payable at the maker's residence or place of business as an address appears at the top of the paper upon which the promise is written. This address however forms no part of the contract. The promise is to pay at Calcutta not at the address. Unless this address forms part of the contract the place of payment is anywhere in Calcutta. In England it has been frequently held that an address appearing under a maker's signature does not form part of the contract and I think no distinction can be drawn if it appears at the top of a document. If such an address formed part of the contract what would be the effect of giving a Calcutta address on the top of the note and making it payable at Allahabad. The note would be payable at Allahabad and there would be no conflict as the address formed no part of the contract.

CIVIL

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

That being so I hold that the learned Judge was wrong in holding that this note was payable at a specified place, and as presentment was not pleaded the plaint disclosed no cause of action. Even if it had been pleaded there was no proof of presentment. But even so, the suit could not be dismissed on that ground as in my view the note which was payable on demand was not a note payable at a specified place and presentment was therefore unnecessary and did not require either pleading or proof.

It was contended in the court below that even if the note was payable at a specified place the defendant No. 2. could not rely on want of presentation by reason of the provisions of section 76, clauses (c) and (d). That section provides:

"No presentment for payment is necessary, and the instrument is dishonoured at the due date for presentment, in any of the following cases:

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented—

he makes a part payment on account of the amount due on the instrument,

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment."

CIVIL.

1951.

Dungarmull

Kissenlal

v.

Shambhu Charan

Pandey.

Harries, C.J.

That there was part payment to defendant No. 1, I think admits of no doubt whatsoever, though the learned Judge was of opinion that it was quite clear from the evidence of defendant No. 2 that he had paid Rs. 625/- as part payment towards the promissory note. It seems to us, on a fair reading of the evidence of defendant No. 2, that he admitted that the sum was paid in part payment and it is to be observed that the attorney of defendant No. 2 actually alleges in the letter of May 28, 1946 that it was paid in part satisfaction of the sum of Rs. 2,000/- which was secured by the note.

The part payment was not pleaded. But of course the payment was not made to the plaintiff and he might well have known nothing about it. It appears to me that if presentation was necessary the defendant could not rely on want of presentation when his attorney had admitted in correspondence before the suit that there had been a payment in part satisfaction. I think the defendant also had clearly admitted in the evidence that he had received the sum of Rs. 625/- in part satisfaction of his dues under the note. If it was necessary we should have been prepared to give the defendant leave to amend and plead this payment. But in my view as the note was not made payable at a specified place the plaintiff need not rely upon this payment in answer to the plea of non-presentation. Of course if the plaintiff had to rely upon this part payment he would have had to give the defendant credit for the payment in the suit.

As it is not necessary for him to rely upon this part payment I do not think that the defendant can claim the benefit of it as against the plaintiff, because there is nothing to suggest that the plaintiff knew of this part payment on the date of the endorsement. The amount of the part payment is not endorsed on the note and there is nothing on the face of the note to suggest that anything had been paid and that the note was anything else but a note for the full amount appearing on the face of it. That being so, it appears to me that the plaintiff is entitled in this case to claim the full amount due on the note and in my judgment the court below was wrong in dismissing the suit.

In the result, therefore, this appeal must be allowed. The decree of the lower court is set aside and the plaintiff's suit must

be decreed for the amount claimed with costs. The plaintiff will be entitled to *pendente lite* interest at the rate of six per cent up to the date of the decree and interest thereafter on the decretal amount at the rate of six per cent until the date of payment. The plaintiff is entitled to withdraw the sum of Rs. 1,713-11-10 lying with the solicitor of the defendants under orders of the Court.

CIVIL.

1951.

Dungarmull

Kissenal

v.

Shambhu Charan

Pandey.

Harries, C.J.

**S. N. Banerjee, J.:**—I agree.

**Mr. B. M. Bagaria:** Solicitor for the Appellant.

**Mr. C. C. Mitter:** Solicitor for the Respondents.

R.M.

*Appeal allowed.*



## FULL BENCH.

*Before Sir Arthur Trevor Harries, Kt., Chief Justice, Mr. Justice G. N. Das, Mr. Justice S. N. Banerjee, Mr. Justice K. C. Das Gupta and Mr. Justice P. B. Mukharji.*

CRIMINAL.

1951.

February, 26.

BHUBAN MOHAN DAS *alias* BHUBAN MOHAN  
RANA KARMAKAR

v.

SURENDRA MOHAN DAS *alias* DERE.\*

*Indian Penal Code (Act-XLV of 1860), section 406—Charge under—If can be framed against a partner—Receiving or holding property by a partner—If can be said to receive or hold the same in fiduciary capacity—Under what circumstances it can be said so—Rights to partnership property until dissolution of accounts—If entrustment at all takes place within the meaning of section 406 of the Indian Penal Code before dissolution—English law on embezzlement—Partnership assets—Concept substantially enacted in Indian law—Entrustment postulates 'separate' property—Arrangement in Chapter XVII of the Indian Penal Code—Partner not mentioned either in section or in illustrations—Fundamental concept of partnership precludes possibility of entrustment—Section 15 of the Partnership Act.*

A partner who is holding property belonging to the partnership could not be said to be holding it in a fiduciary capacity and as such it is impossible to hold that he could be said to have been entrusted with that property.

At common law in England a partner could not be charged with larceny or embezzlement of partnership property. Although English law has met this by enacting special provisions, the Indian law has not done so.

The share of a partner in the partnership assets cannot be predicated until an account is taken and all debts discharged; until that has been done it cannot be said that assets belong to any particular partner. Until dissolution of accounts each partner must be regarded as having a right to the property and he does not hold it in fiduciary capacity.

\* Full Bench Reference No. 2 of 1950 *in re*: Criminal Revision Case No. 585 of 1950.

*Lindley on Partnership*, 10th Edn. p. 415 referred to;

*Gopala Chetty v. Vijayaraghavachariar* (1) relied on;

*Lall Chand Roy* (2) referred to.

CRIMINAL.

1951.

Bhuban Mohan  
Das

v.

Surendra Mohan  
Das

The decisions in *Queen v. Okhoy Coomar Shaw* (3) and *Alla Rakha v. Luhat Hossain* (4) cannot be regarded as correctly decided if they lay down any general rule applicable to prosecutions of partners for offence under section 406 of the Indian Penal Code in respect of property held by partners in the ordinary course of partnership dealings. They may be regarded as correctly decided if they are confined to cases of special agreements under which entrustment or dominion is conferred upon a partner.

*Debi Prosad Bhagat v. Nagar Mull* (5), *Bhupendra Nath Singh v. Giridharilal Nagar* (6) and *M. Rahaman v R.D. Khambatta* (7) referred to.

*Man Mohan Das v. Mahendra Bhowal* (8) relied on.

*Emperor v. Jagannath Raghunath Das* (9), *Mandavalli Satyanarayana Murthi v. Kotha Manikyal Rao* (10) and *Bhudar Mal Marwari v. Ram Chandar Marwari* (11) commented upon.

*Per S. N. Banerjee, J.*—The English law relating to nature of partner's property in partnership has been in substance enacted in section 46 of the Indian Partnership Act. Rights of partners under section 39 of the English Act is known as his general lien on the surplus of the assets of the firm and is commonly called partner's lien.

*Re. Bourne* (12), *Darby v. Darby* (13) *Crawshaw v. Collins* (14), *Featherstonehaugh v. Fenwick* (15), *Ajudhya Pershad v. Sham Sundar* (16) referred to.

*Per P. B. Mukharji, J.*—The group of sections viz. sections 403 to 409 of the Indian Penal Code occurring in Chapter XVII of the Code deals with many classes of persons specially and specifically mentioned but they make no reference to a partner nor there is any reference in numerous statutory illustrations given thereunder

- |                                    |                                       |
|------------------------------------|---------------------------------------|
| (1) [1922] 1 A.C. 488.             | (9) (1931) 33 Bom. L.R. 1518.         |
| (2) (1868) 9 W.R. (Cr. Rul.) 37.   | (10) (1940) 187 I.C. 126.             |
| (3) (1874) 13 B.L.R. 307.          | (11) (1920) 55 I.C. 674.              |
| (4) (1939-40) 44 C.W.N. 650.       | (12) (1906) 2 Cm. 427.                |
| (5) (1908) 1 I.L.R. 35 Calc. 1108. | (13) (1856) 2 Drew. 495 (503).        |
| (6) (1933) 1 I.L.R. 60 Calc. 1316. | (14) (1808) 15 Ves. 218.              |
| (7) (1949) 50 Cr. L.J. 154.        | (15) (1810) 17 Ves. 298.              |
| (8) (1947-48) 52 C.W.N. 441.       | (16) [1947] I.L.R. Lah. 417 (433-438) |

## CRIMINAL.

1951.

Bhuban Mohan  
Das  
v.  
Surendra Mohan  
Das

Sections 9, 10, 13, 15, 19 and 24 of the Indian Partnership Act relate to precise relations between partners yet those cannot lead to the conclusion that one partner can commit the offence of criminal breach of trust. The fundamental nature of the question is that the very conception of partnership precludes possibility of entrustment or dominion; the generality and amplitude of the expression 'whoever' in section 405 of the Indian Penal Code *prima facie* would include a partner but in view of section 15 of the Partnership Act no one partner can be said to be entrusted with the partnership property under the ordinary incidents of partnership law. Except under a special contract making entrustment of property, there cannot be criminal breach of trust.

Reference to a Full Bench made by a Bench of this Court in a criminal matter.

Criminal Revision petition by the accused in which he prayed that certain proceedings instituted against him under section 406 of the Indian Penal Code and which were then pending in the Court of a Magistrate at Howrah should be quashed.

The material facts will appear from the judgments.

*Messrs. Debabrata Mookerjee, Biswanath Roy, Sambhunath Banerjee (Sr.) and Ajay Kumar Basu* for the Petitioner.

*Messrs. Sudhansu Sekhar Mukherjee, Kishore Prosad Mookerjee and Birendra Narayan Sinha* for the Opposite Party.

The judgments of the Court were as follows:—

February, 26

**Harries, C.J.:**—This is a Reference to a Full Bench made by a Bench of this Court in a criminal matter.

A petition in revision was heard by the Bench which has referred this case in which the petitioner prayed that certain proceedings instituted against him under section 406 of the Indian Penal Code and which were then pending in the Court of a Magistrate at Howrah should be quashed.

The petitioner and the opposite party who preferred the complaint were partners and it is said that they carried on business at shop situate at No. 34, Bellillios Road, Howrah. The business was a business of selling ghee, butter and stationery articles. On February 12, 1950, communal disturbances took place in Howrah and according to the complaint the petitioner proposed to him that all the articles in the shop should be

removed to the petitioner's house at 29/2, Beniatola Lane, Calcutta, which was outside the danger zone. The complainant stated that he agreed whereupon the petitioner procured a taxi cab and loaded it with articles which were in the shop. The communal disturbances passed off and according to the complainant he went to the petitioner's house on May 1, 1950, to collect the articles and bring them back to the shop. The petitioner it is said told the complainant that he would return the articles in two or three days' time, but this he did not do. On March 15, 1950, the complainant stated that he again went to the petitioner's house to obtain the articles and he was then told by the petitioner that he had no knowledge of the articles at all.

CRIMINAL.  
—  
1951.  
—  
Bhuban Mohan  
Das  
v.  
Surendra Mohan  
Das  
—  
Harries, C.J.

On behalf of the petitioner it was contended before the Bench that no proceedings under section 406 of the Indian Penal Code could lie in this case as the parties were partners. The point appears to have been taken before the Learned Magistrate, but he had overruled the objection and framed a charge.

The Bench found that the authorities of this Court on this matter were in conflict and being unable to resolve the conflict, the case was referred to a Full Bench. The points formulated for decision by the Full Bench were as follows:—

- (1) Can a charge under section 406 of the Indian Penal Code be framed against a person who according to the complainant, is a partner with him and is accused of the offence in respect of property belonging to both of them as partners?
- (2) Are *Queen v. Okhoy Coomar Shaw* (1) and *Alla Rakha v. Liakal Hossein* (2) correctly decided?

The Reference first came before a Full Bench of three Judges. But as the correctness of the earlier Full Bench case of *Queen v. Okhoy Coomar Shaw* (1) had to be considered the matter was adjourned and has now come before this Full Bench of five Judges.

(1) (1874) 13 B.L.R. 307.

(2) (1939-40) 44 C.W.N. 650.

## CRIMINAL.

1951.

Bhuban Mohan

Das

v.

Surendra Mohan

Das

Harries, C.J.

Section 406 of the Indian Penal Code provides:—

“Whoever commits criminal breach of trust shall be punished with imprisonment of either description for a term which may extend to 3 years, or with fine, or with both.”

The phrase “criminal breach of trust” is defined in Section 405 of the Indian Penal Code in these terms:—

“Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits ‘criminal breach of trust.’”

It seems clear that before criminal breach of trust is established it must be shown that the person charged has been entrusted with property or with dominion over property and that he has been guilty of “breach of trust” using that latter phrase loosely. There must be entrustment and therefore the person accused must be shown to have held the property in a fiduciary capacity.

On behalf of the petitioner it has been contended that a partner does not in the ordinary course hold partnership property in a fiduciary capacity. The partnership property belongs to the partners and one partner, apart from any special agreement, has as much right to the property as any other partner. A partner who holds partnership property, it is said, holds it in his own right and it cannot possibly be said that he holds it in a fiduciary capacity.

The question whether a partner received or held partnership property in a fiduciary capacity was considered by the English Courts in the case of *Piddocke v. Burt* (1) where it was held that one partner receiving assets of the partnership on

(1) [1894] 1 Ch. 343.

account of himself and his co-partners, is not liable to imprisonment under Section 4(3) of the Debtors Act, 1869, as a person acting in a fiduciary capacity.

The point which had to be considered in that case was whether a partner who had retained certain of the partnership assets could be said to have acted in a fiduciary capacity. At page 346 Chitty J. observed:—

“The case of a partner is quite different from these cases, because he receives money belonging to the firm on behalf of himself and his co-partners, and it appears to me that I should be straining the law if I were to hold that a partner receiving money on account of the partnership—that is, on behalf of himself and his co-partners—received it in a fiduciary capacity towards the other partners. The law allows one partner—one of several joint creditors—to receive the whole debt on account of the firm to whom it is due, and I am unable to recognise any such distinction, as was endeavoured to be made by Mr. Church, between the case of a partner receiving money of the firm and not accounting for it, and that of a partner overdrawing the partnership account; because if this distinction were true, it would apply to every case where one partner wrongly overdraws the partnership account.”

The learned Judge having held that a partner who receives money of the partnership firm did not hold the money in a fiduciary capacity, held that no offence had been committed under the Debtors Act.

If a partner who receives money on behalf of the partnership does not receive it in a fiduciary capacity then it appears to me that he could not be charged with fraudulent breach of trust by reason of his failing to account for that money. Similarly, if a partner is holding property belonging to the partnership, he is holding it as one of the partners entitled to hold it and therefore I think it could not be said that he was holding it in a fiduciary capacity, that is, as a kind of trustee for himself and his other partners. If he could not be said to be holding the property in a fiduciary capacity then it is difficult, and indeed impossible to hold that he could be said to have been entrusted with that property.

CRIMINAL.

1951.

Bhuban Mohan  
Das

v.  
Surendra Mohan  
Das

Harries, C.J.

## CRIMINAL.

—  
1951.

Bhuban Mohan  
Das

v.

Surendra Mohan  
Das

—  
Harries, C.J.

It is quite clear that at common law in England a partner could not be charged with larceny of partnership property, neither could he be charged with embezzlement of such property. As agent of the firm a partner could be said to have received property on behalf of the firm and if he did not account for it, it could be said that he as an agent or servant of the firm had embezzled the money. Nevertheless at common law he could not be prosecuted for embezzlement. To meet the difficulty a special section was enacted in the Larceny Act and thereafter a partner could be prosecuted for larceny or embezzlement of partnership property. Under the old common law it was impossible to charge a partner with larceny because the property alleged to have been stolen was as much the accused's property as the property of the other partners. Similarly the money said to have been embezzled was as much the accused's property as that of his co-partner. The difficulty was realised in English law and was met by the enactment of a special provision. But there is no such special provision in the Indian Law.

The rights of partners in partnership property is dealt with by Lord Lindley in his book *on Partnership, 10th Edition at page 415* in these words:—

“In the absence of a special agreement to that effect, all the members of an ordinary partnership are interested in the whole of the partnership property, but it is not quite clear whether they are interested therein as tenants in common or as joint tenants without benefit of survivorship, if indeed there is any difference between the two. It follows from this community of interest, that no partner has a right to take any portion of the partnership property and to say that it is his exclusively. No partner has any such right, either during the existence of the partnership or after it has been dissolved.

What is meant by the *share* of a partner is his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share.”

Again at page 419 Lord Lindley observed:—

“From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal and not real estate.”

CRIMINAL.

1951.

Bhuban Mohan  
Das  
v.  
Surendra Mohan  
Das

Harries, C J.

From these observations it is clear that the share of a partner in the partnership assets cannot be predicated until an account has been taken and all the debts have been discharged. Until that has been done it cannot be said that a partnership asset belongs to any particular partner or that any particular share of it belongs to any particular partner. That being so, if one partner retains a partnership asset can it be said that property belonging to somebody else has been entrusted to him, or at least the share of his co-partners has been entrusted to him? It may be that two persons each own a half share in a partnership and at first sight it might appear as if each would own a half of every asset of the partnership. However that by no means follows, because if at any given moment the partnership account was taken and the debts discharged, it might be that the assets belonged wholly to one of the partners or indeed after payment of debts there might be no assets at all for any of them. It is therefore impossible to say at any given moment before accounts have been taken, what share, if any, a partner has in the property. Until dissolution of accounts each partner must be regarded as having a right to the property and he does not hold it in a fiduciary capacity.

It seems to me that if a partner is to be charged under section 406 of the Indian Penal Code it must be held that property belonging to somebody else was entrusted to him. A partnership firm has no existence apart from the partners and is not an entity like a limited company which can own property. If a partner holds partnership property it cannot be said that he has been entrusted with his own share in the property if he had any share in it. But can it be said that the partner has been



|                |                                                                     |
|----------------|---------------------------------------------------------------------|
| CRIMINAL.      | entrusted with the other partner's share? The question              |
| —              | immediately arises what is the other partner's share, and as        |
| 1951.          | pointed out by Lord Lindley, he has no definite share until the     |
| Bhuban Mohan   | accounts have been taken and the debts discharged and the assets    |
| Das            | divided according to the partnership agreement. That being so       |
| v.             | it appears to me that it cannot be said that a partner who receives |
| Surendra Mohan | partnership property is entrusted with his co-partner's share of    |
| Das            | that property to bring the case within Section 406 of the Indian    |
| —              | Penal Code.                                                         |
| Harries, C J.  |                                                                     |

The rights of a partner in any particular asset was considered by their Lordships of the Privy Council in the case of *Gopala Chetty v. Vijayaraghavachariar* (1) in which it was held that if a partnership had been dissolved but no account had been taken, the proper remedy of a partner in respect of an asset received by another partner was to have an account taken and if his right to sue for an account was barred by limitation he could not sue the partner who had received the asset for a share of it. Their Lordships of the Privy Council in other words held that even after a partnership had been dissolved a partner cannot sue another for a definite share in an asset because it is not known whether he has a share and if he has, what the extent is unless an account has been taken and the debts have all been paid. If even after dissolution a partner could not sue another partner for his share of an asset then it seems to me quite impossible to suggest that the partner who retained that asset was holding at least a share of that asset in a fiduciary capacity on behalf of his co-partner. Unless the relationship of partnership imposes, on one partner holding property, fiduciary obligations, then it appears to me that it cannot be said that that partner, if he holds property of the partnership with the consent of the others, has been entrusted with it, and that he is guilty of a fraud on his trust in not accounting to his co-partners for the property.

This matter has been considered by this Court in a number of cases. The first case is the case of *Lall Chand Roy* (2). There the accused was convicted of criminal breach of trust in respect of the value of goods which had been entrusted to him to sell. It was urged before the High

(1) [1922] 1 A.C. 488.

(2) (1868) 9 W.R. (Cr. Rul.) 37.

Court that the conviction could not be sustained, as the accused was a partner with the prosecutor. It was held by Kemp and Mitter JJ. that being a partner he could not be prosecuted. Jackson J. took a different view, but not upon the law. He held that it had not been shown that the accused was a partner. This case was considered by a Full Bench of this Court in the case of *The Queen v. Okhoy Coomar Shaw*, (1). In that case a Magistrate relying upon the decision in the petition of *Lall Chand Roy* (2), to which I have just made reference, discharged the accused on the ground that they could not be prosecuted for an offence under section 405 of the Indian Penal Code. A revision petition from the order of the Magistrate came before a Bench of this Court which thought that the decision in *Lall Chand Roy's case* (2) needed consideration and referred the following question to a Full Bench:—

CRIMINAL.  
—  
1951.  
Bhuban Mohan  
Das  
v.  
Surendra Mohan  
Das  
—  
Harries, C.J.

“Whether, if a partner dishonestly misappropriates or converts to his own use, or dishonestly uses or disposes of any of the partnership property which he is entrusted with, or has dominion over, he is guilty of an offence punishable under the Penal Code?”

A Full Bench consisting of five Judges came to the conclusion that the case of *Lall Chand Roy* (2) could not be supported and directed that the order of discharge of the learned Magistrate should be set aside and that he should enquire into the merits and decide whether or not an offence had been committed. The question submitted to the Full Bench was answered in the affirmative. But it is by no means clear in what circumstances the Full Bench were of opinion that an offence would be established. They observed at page 311:—

“If it be made out by the evidence, that one partner was entrusted by his co-partners with property or with a dominion over it, and that he had dishonestly misappropriated it, or dishonestly used it in violation of the mode in which his trust was to be discharged, or of the agreement between the parties as to the use he was to make of the property, he ought to be tried for that offence.”

Of course if it could be made out that one partner had been entrusted with property or with dominion over it no difficulty

(1) (1874) 13 B.L.R. 307.

(2) (1868) 9 W.R. (Cr. Rul.) 37.

CRIMINAL.

1951.

Bhuban Mohan

Das

v.

Surendra Mohan

Das

Harries, C.J.

would arise. But the question we have to consider is whether or not a partner who receives partnership property without any special agreement can be said to have been entrusted with that property or with dominion over it. A partner who receives partnership property has dominion over that property quite apart from any arrangement with his other partners. The fact that he is a partner gives him dominion over the property and if the English view be right he does not hold that property in a fiduciary capacity. It may be that by special arrangement between the parties one partner could be regarded as being entrusted with property. But apart from such special arrangement it cannot be said that a partner who receives partnership property on behalf of his partners has been given dominion over that property by his co-partners, or has been given dominion over the share of his co-partners by the latter. This Full Bench case is certainly authority for the proposition that in some circumstances a partner can be charged under section 406 of the Indian Penal Code. But it is not very helpful, with great respect, to a Court which is called upon to decide whether a partner receiving a partnership asset in his capacity as a partner is guilty of fraudulent breach of trust, if he did not account for it.

The Full Bench never seems to have considered that there is really no partner's share in the property until an account and it may well be that a partner, who retains an asset, is entitled not only to his share according to the partnership agreement in that asset, but on taking an account it may be found that he is entitled to the whole of the asset and considerably more. In such a case how can it be said that he has been guilty of a breach of trust and has acted dishonestly towards his co-partners, if an account would show that he was entitled to everything which he had retained?

This Full Bench decision has been considered in a number of Bench decisions. In the case of *Devi Prosad Bhagat v. Nagar Mull*, (1) it was held that a partner was entitled to be called upon for an account of the expenditure of the money which he had received and it was open to him to spend the money received by him and to account for it in dealing with the partnership. Where it was not satisfactorily made out that

(1) (1908) I.L.R. 35 Calc 1108.

this was not done, and could not be made out in the absence of a proper demand for accounts, it was held that there was no dishonest conversion which would justify his conviction under section 406 of the Indian Penal Code. At page 1110 the learned Judges observed:—

“But considering that there was a partnership existing at this time, the accused was plainly entitled to be called upon for account of the expenditure of the money, which he had received, for, as the contract was one of partnership and not of bailment, it was open to the accused to spend the money he had received and to account for it in dealing with the partnership.”

This view clearly supports the petitioner in the present case. If a partner could be said to have been entrusted with the money it would not have been open to him to spend the money which he had received and to account for it in the accounts of the partnership. A person who receives property in a fiduciary capacity must deal with the property according to the terms of the arrangement or trust. He cannot dispose of the property as he likes and claim to account for it at some later stage.

The matter again came before the Court in the case of *Bhubendranath Singha v. Giridharilal Nagar* (1), in which it was held that when a partner was proved in fact to have been entrusted with the partnership property or with dominion over it, and had dishonestly misappropriated it or converted it to his own use, he could be convicted of an offence under section 405 or rather 406 of the Indian Penal Code. But the Bench added that it was difficult however to conceive how such a situation could arise. It was further held that each partner was co-owner of the whole of the common stock, though he received or paid a share only in profits and losses arising therefrom, and it was difficult to conceive how he could be entrusted with, or within dominion over his own property or how he could dishonestly misappropriate it or convert it to his own use.

This case followed the Full Bench in that it held that there were circumstances in which a partner might be guilty of an offence under section 406 of the Indian Penal Code. But the view of the Bench is clear that in ordinary cases where a partner receives money or property of a partnership or holds property

(1) (1933) I.L.R. 60 Cal. 1318.

CRIMINAL.

1951.

Bhuban Mohan  
Das

v.

Surendra Mohan  
Das

Harries, C.J.

CRIMINAL.

—  
1951.

Bhuban Mohan

Das

v.

Surenendra Mohan

Das

—  
Haries, C.J.

or money of a partnership, he does not receive or hold that property in a fiduciary capacity and if he spends it he cannot be guilty of the crime of fraudulent breach of trust. The remedy is an account and in that account the partner who has retained the money or property must account for it in ascertaining what his share of the partnership assets will be.

In a later case *Alla Rakha v. Liakat Hossain* (1), a Bench of this Court took a somewhat different view from that taken in *Bhupendranath Singh's* case (2). The Bench held that it was not the law that in no case can charges under sections 403 to 409 of the Indian Penal Code be framed against a person who is a partner and is accused of offences under those sections in respect of partnership property. The learned Judges observed:—

“The words of section 403 are large enough to include the case of a partner if it be proved that he was in fact entrusted with the partnership property or with dominion over it and has dishonestly misappropriated it or converted it to his own use.”

The learned Judges however do not state whether in their view a partner who receives partnership property or money on behalf of the partnership can be said to have been entrusted with it and therefore guilty of fraudulent breach of trust if he does not dispose of it in accordance with the trust or arrangement. It seems that in the case of *Alla Rakha v. Liakat Hossain* (1) the Bench were not inclined to follow the views expressed in *Bhupendranath Singh's* case (2).

In the case of *Man Mohan Das v. Mohendra-Bhowal*, (3) a Bench of this Court held that a partner who received money on behalf of the partnership did not receive it in a fiduciary capacity. Consequently, when one partner was alleged to have withheld the share of the profits of the partnership business said to be due to another partner, he could not be prosecuted for an offence under section 406 of the Indian Penal Code.

This case was somewhat different from the others. The partner prosecuted was alleged to have withheld the complainant's share of the partnership profits. But it is clear that partnership profits are not ascertainable until an account has been taken

(1) (1939-40) 44 C.W.N. 650.

(2) (1933) I L.R. 60 Cal. 1316.

(3) (1947-48) 53 C.W.N. 441.

and it cannot be said until such an account that any partner has any share in such profits. I think this later case is clearly right because it could not possibly be said that a partner or partners had been entrusted with another partner's share of the partnership profits before it could be whether any profits or not and such could not be said until an account had been taken. The last case is the case of *M. Rahaman v. R. D. Khambatta* (1) in which the view was taken that in ordinary circumstances a partner could not be prosecuted under section 406 of the Indian Penal Code for fraudulent breach of trust in not accounting for partnership property.

CRIMINAL.

1951.

Bhuban Mohan  
Dasv.  
Surendra Mohan  
Das

Harries, C.J.

Bombay has taken a view that a partner may be prosecuted under section 406 of the Indian Penal Code for failure to account for partnership moneys or assets. In *Emperor v. Jagannath Raghunathdas* (2) a Bench held that the words of section 406 of the Indian Penal Code were wide enough to cover the case of a partner. Where one partner was given authority by the other partners to collect moneys or property of the firm, he was entrusted with dominion over that property; and if he dishonestly misappropriated it he came within the section. The Bench however added that the Court was one of criminal breach of trust. It was impossible to say in many cases what the share of the accused might be, whether the accused was indebted to the firm or whether the firm was indebted to him. If the firm was indebted to him there might be no dishonest intent in his withdrawing money from the firm. If there was any doubt upon the matter, the accused must always have the benefit of the doubt.

The Bench of the Bombay High Court realised that whether or not there was a dishonest intent would depend upon a partnership account and the criminal courts which appeared to be singularly inappropriate for taking partnership accounts were warned to be very careful. The Bombay case however does not consider the English authorities and does not consider whether or not a partner who receives money from a creditor of the firm holds that money in a fiduciary capacity. It seems to have been assumed by the learned Judges that the partner did, whereas as I have pointed out the English view was that the partner did not hold the money in a fiduciary capacity and it appears to me that

(1) (1949) 50 Cr. L.J. 154.

(2) (1931) 33 Bom. L.R. 1518.

CRIMINAL.

1951.

Bhuban Mohan  
Das

v.

Surendra Mohan  
Das

Harries, C.J.

the English view is correct and has been followed by a number of Benches of this Court.

A view similar to the Bombay view has been taken by the Madras High Court in the case of *Mandavalli Satyanarayana-murti v. Kotha Manikyala Rao* (1) and by the Patna High Court in the case of *Bhudar Mal Marwari v. Ramchander Marwari* (2). These cases do not advance the matter any further because the Benches merely purported to follow the Full Bench case of this Court in *The Queen v. Okhoy Coomar Shaw* (3).

Whether or not a partner can be said to have entrusted with property must depend upon whether there is any special agreement between the parties. If there is no special agreement he does not receive property in a fiduciary capacity. It might be that if there was a special arrangement between the partners then it could be said that a partner was entrusted with property or with dominion over it. For example, if by the terms of the partnership agreement one partner was given the sole right to possession of the partnership assets or to receive moneys on behalf of the partnership then such a partner might, though it is unnecessary to hold it, be said to have entrusted another partner with money if he gave such other partner money for a specific purpose. It is unnecessary in this case to decide in what circumstances there can be entrustment. But all we need say is that by special agreement between the parties entrustment might be possible, and if entrustment was possible then a breach of the conditions or arrangement might render the person accused guilty of fraudulent breach of trust. However I am satisfied that in ordinary cases where a partner receives moneys or an asset belonging to a partnership, or holds moneys or assets of a partnership, he does not hold that money in a fiduciary capacity. He cannot even be sued for a share in the moneys or assets by his co-partner.

The only remedy of a co-partner is an account and until such an account is taken it cannot be said whether the co-partner has any interest at all in the asset or money. As pointed out in

(1) (1940) 187 I.C. 126.

(2) (1920) 55 I.C. 674.

(3) (1874) 13 B.L.R. 307.

the case of *Gopala Chetty v. Viyajaraghavacharier* (1) decided by their Lordships of the Privy Council, even after dissolution a co-partner has no right to sue for his share of an asset. It appears to me that if a co-partner has no right to sue to recover his share it cannot possibly be said that his co-partner is holding that share in trust for him. If the partner holds partnership property in a fiduciary capacity he would be holding it in trust for his co-partners and his co-partners could sue. But it has been laid down beyond all question that the co-partners cannot sue and that their only remedy is an account and to recover only what is ultimately found due on taking the account. It appears to me that in those circumstances it cannot be said that a partner who receives or holds property of a partnership is entrusted with the property or dominion over it, and that being so it appears to me that the answer to question 1 must be in the negative.

CRIMINAL.

1951.

Bhuban Mohan

Das

v.

Surendra Mohan

Das

Harries, C.J.

The answer to question 2 must be that these cases cannot be regarded as correctly decided if they lay down any general rules applicable to prosecutions of partners for offence under section 406 of the Indian Penal Code in respect of property received or held by such partners on behalf of the partnership in the ordinary course of partnership dealings. However the case may be regarded as rightly decided if they are confined to cases where under special agreements made between the parties entrustment of the property or dominion over it could be given to any particular partner.

Under the rules of this Court the Full Bench must not only answer the questions, but must decide the petition. It appears to me that the petition must be allowed and the proceedings before the learned Magistrate quashed because no entrustment could be established in the circumstances of this particular case.

In the result therefore the petition is allowed and the proceedings now pending in the Court of the learned Magistrate at Howrah are quashed. The rule is accordingly made absolute.

**G. N. Das, J.:**—I agree with my Lord the Chief Justice.

**S. N. Banerjee, J.:**—I agree.

(1) [1922] 1 A.C. 488.



## CRIMINAL.

1951.

Bhuban Mohan

Das

v.

Surendra Mohan

Das

Banerjee, J.

To constitute the offence of criminal breach of trust there must be entrustment of property in respect of which the breach of trust is charged. It closely resembles the offence of embezzlement under the English law. The section requires entrusting any person with property or with any dominion over property. It further requires dishonest misappropriation or conversion of that property by the person charged, to his own use, or dishonest disposal of it. The offence consists of any one of four positive acts namely, misappropriation, conversion, user, or disposal of property.

Dishonest intention is the gist of the offence. It follows, therefore, that if there is no "property" which is the subject matter of entrustment, there cannot be any criminal breach of trust. Likewise if there is no dishonest intention, there is no offence committed.

In the judgment of the learned Chief Justice, the nature of a partner's property in the partnership assets has been discussed. That is the English law. That is also the Indian Law. The substance of the English Law has been enacted in section 46 of the Indian Partnership Act. Section 46 is as follows:—

"On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm, and to have the surplus distributed among the partners or their representatives according to their rights."

This section is in substance section 39 of the English Act, with verbal condensation. This section affirms the right of partners or their representatives to a share of the net assets of the firm after the firm is dissolved and the account is taken.

The right of a partner under this section is known as his general lien on the surplus of the assets of the firm and is commonly called partners' lien. *Re: Bourne* (1).

The principle of the section was stated in *Darby v. Darby* (2) and by Lord Eldon in *Crawshay v. Collins* (3)

(1) (1906) 2 Cm. 427.

(2) (1856) 2 Drew. 495, 503.

(3) (1808) 15 Ves. 218.

and by Sir William Grant in *Featherstone-haugh v. Fenwick* (1). On the nature of the right given to a partner by this section, Pollock observes as follows (pages 99, 100):—

“The first of each partner to control within certain limits the disposition of the partnership property is a rather peculiar one. It exists during the partnership, and when accounts are taken and the partners' shares ascertained from time to time, its existence is assumed, but it comes into full play only in the event of a dissolution. It belongs to a class of rights known as equitable liens, which have nothing to do with possession, and must therefore be carefully distinguished from the possessory liens which are familiar in several heads of the Common Law. The Possessory lien of an unpaid vendor, factor, or the like, is a mere right to hold the goods of another man until he makes a certain payment; it does not, as a rule, carry with it the right of dealing with the goods in any way. Equitable lien, on the other hand, is nothing else than the right to have a specific portion of property dealt with in a particular way for the satisfaction of specific claims.”

The Partnership Act contemplates complete liquidation of the assets of the partnership as a preliminary to the settlement of accounts between partners upon dissolution of the firm and unless there is an agreement to the contrary, the share of each partner means “his proportion of the partnership assets after they have been all realised and converted into money, and all the partnership debts and liabilities have been paid and discharged.” (See also *Ajudhya Pershad v. Sham Sundar* (2).

“Partnership assets” mean everything to which the firm, or in other words all the partners composing it, can be considered to be entitled as such. The qualification “as such” is important; for persons may be entitled jointly or in common to property, and the same persons may be partners, and yet that property may not be partnership property, e.g., if several persons are partners in trade, and land is devised or a legacy is bequeathed to them jointly or in common, it will not necessarily become partnership property and form part of the common

CRIMINAL.

1951.

Bhuban Mohan  
Dasv.  
Surendra Mohan  
Das

Banerjee, J.

(1) (1810) 17 Ves. 298.

(2) [1947] I.L.R. Lah. Pages 417, 443-448.

CRIMINAL. stock in which they are interested as partners. Whether it  
 ——— does so or does not, depends upon the circumstances of  
 1951. each case. It is for the partners to determine by agreement  
 amongst themselves what shall be the property of the  
 Bhuban Mohan Das firm, and what shall be the separate property of one  
 v. or more of them. The true methods of determining as  
 Surendra Mohan Das between the partners themselves what belongs to the firm, and  
 ——— what not, is to ascertain what agreement has been come to  
 Banerjee, J. upon the subject. *Lindley on Partnership, 9th Edition, pages 409, 416.*

It is quite clear, therefore, that unless there is an agreement between the partners that a particular property would be the separate property of a partner, there cannot be an entrustment of it to the other partner or partners. In the absence of such an agreement, each partner is interested in the whole of the partnership assets and there cannot be an entrustment of "a partner's property" as such by one partner to another, because there is no "property" which can be entrusted.

In the case before us there is no evidence that there was an agreement by which the partnership assets were converted into separate property of the partners. Therefore there cannot be a breach of trust, because nothing was or could be entrusted.

**K. G. Das Gupta, J.:**—I entirely agree with my Lord the Chief Justice.

**P. B. Mukharji, J.:**—I agree with the conclusions and the reasonings given in the judgments of my Lord the Chief Justice and of my Lord Mr. Justice Banerjee. I would only wish to add a few more reasons to support the same conclusion.

The point for decision before the Court is can a partner be prosecuted under section 406, I.P.C., for criminal breach of trust in respect of partnership assets. Sir Richard Couch, C.J. delivering judgment for a Full Bench of the Calcutta High Court in *Nrigendro Lall Chatterjee v. Oghay Ggomar Shaw* (1) observed:—

(1) (1874) 21 W.R. (Cr. 89).

"We think the words in section 405 of the Penal Code are large enough to include the case of a partner if it be proved that he was in fact entrusted with the partnership property or with a dominion over it and has dishonestly misappropriated it or converted it to his own use. There is no reason that the case of a partner should be excepted from the operation of this section. Indeed there is every reason that it should be included in it. It is question of fact whether there has been an entrusting of the property or giving a dominion over it sufficient to come within what is required."

CRIMINAL.

1951.

Bhuban Mohan  
Das

v.

Surendra Mohan  
Das

Mukharji, J.

This decision was rendered in 1874 and has caused considerable anxiety for more than 70 years. On two main grounds the soundness of this decision has been questioned more than once. First the decision is said to be verbal and academic and its practical import is difficult to find. This decision gives no indication to show how and under what circumstances a partner can at all be said to be entrusted with partnership property or with dominion over it or to have misappropriated it and it is difficult, if not impossible, to conceive how such a situation can arise. This criticism is put on the ground of the law of partnership. In *Piddock v. Burt* (1), it is held that a partner who receives money belonging to the partnership on account of himself and his co-partner does not do so in a fiduciary capacity. At common Law in England no criminal prosecution can be maintained by one partner against another for stealing or embezzling by false pretexts or misappropriating property of the firm. Partners are regarded in law as joint owners or co-owners of the partnership property. Secondly, sections 403 to 409 of the Indian Penal Code occur under "Offences against property" in Chapter XVII of that Code under the sub-heading "Criminal misappropriation of property." This group of sections deals with many classes of persons who are specially and specifically mentioned but they make no reference to a partner. Section 407, I.P.C., deals with criminal breach of trust by carrier wharfinger or ware-house-keeper. Section 408, I.P.C., refers to criminal breach of trust by clerk or servant. Section 409, I.P.C., refers to criminal breach of trust by a public servant or by Banker, merchant or agent. The case of a partner is not mentioned in any of these sections or even in the numerous statutory

(1) [1894] 1 Ch. 343.

## CRIMINAL.

1951.

Bhuban Mohan  
Das

v.

Suiendra Mohan  
Das

Mukharji, J.

illustrations given thereunder. The statutory illustrations indicate persons entrusted absolutely with the property of another and not property which belongs either partly or wholly to the accused. If illustrations are any indication then these sections of the Penal Code are not intended to be applied to partners. Illustration (c) of section 403, I.P.C., which refers to joint owners of a horse and says that one of the joint owners can take the horse out of the possession of the other is of no assistance in this case because unlike the illustration the partnership account is a general account and is not confined to a specified item of property as the horse in the illustration. Then again in this connection a reference to section 424, I.P.C., will show that there can be dishonest or fraudulent removal or concealment of one's own property because of the specific language used in that section, namely, "property of himself or any other person."

Some of these criticisms will be found in the judgment of Lord Williams J. in *Bhupendra Singh v. Giridharilal Nagar* (1). Harries, C.J. in *Monmohan Das v. Mohendra Bhowal* (2), refers to this decision of Lord William J. while holding that a partner who receives the money on behalf of the partnership does not receive it in a fiduciary capacity. The Bombay High Court adopted the view of the Calcutta Full Bench and Beaumont C.J. in *Emperor v. Jagannath* (3), overruled the argument advanced on the basis of statutory illustrations of the Penal Code and came to the conclusion that the words of the section are wide enough to cover the case of a partner at pages 1520 and 1521.

An analysis and survey of the various sections of the Indian Partnership Act are necessary to discover the true nature, character and incident of partnership property. Section 19 of the Partnership Act discloses the implied authority of a partner to deal with partnership property to bind the firm. Section 24 of the same Act contemplates notice to the partner as notice to the firm except in the case of fraud on the firm committed by or with the consent of that partner. But the sections relating to the property of the firm lay down the rules what such partnership property is and how is that to be

(1) (1933) I L.R. 60 Calc. 1316.

(2) (1947-48) 52 C.W.N. 441.

(3) (1931) 33 Bom. L.R. 1518.

applied. Section 15 of the Partnership Act provides that subject to contract between the partners, the property of the firm shall be held and used by the partners, exclusively for the purposes of the business. Section 9 of the Partnership Act enjoins each partner to be just and faithful to each other. Section 10 of the Partnership Act requires that every partner shall indemnify the firm for any loss caused to the firm by his fraud in the conduct of the business while section 13 of the same Act requires a partner to indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business.

CRIMINAL.

1951.

Bhuban Mohan

Das

v.

Surendra Mohan

Das

Mukharji, J.

It does not appear to my mind that sections of the Partnership Act relating to indemnification for the loss either for the fraud or wilful neglect of the partner nor even the section where one partner is required to be just and faithful to the other can lead to the conclusion that one partner can commit the offence for criminal breach of trust as against the other partner in respect of partnership property. The question here is of much broader application and of a more fundamental nature. Its fundamental nature is this that the very conception of partnership precludes possibility of entrustment or dominion of the partnership property by one partner as against the other and therefore precludes any possible operation of the crime under section 406, I.P.C., of criminal breach of trust by one partner against the other in respect of the partnership property.

In England the same difficulty arose and the disability was partially removed first by 31 and 32 Victoria, Chapter 116 and now replaced by section 40(4) of the Larceny Act, 1916, but no similar legislation has been enacted in India. Section 40(4) of the Larceny Act of 1916 (6 and 7 George V, Chapter 50) provides as follows:—

“If any person, who is a member of only co-partnership or is one of two or more beneficial owners of any property, steals or embezzles any such property of or belonging to such co-partnership or to such beneficial owners he shall be liable to be dealt with, tried and punished as if he had not been or was not a member of such co-partnership or one of such beneficial owners.”

Further in-roads on the Common Law in England were made by such statutes as section 24 of Forgery Act, 1861 (24 and

CRIMINAL. 25 Victoria, Chapter 98) under which Act it was forgery to endorse a bill by procuration under a false and fraudulent assumption of authority so to endorse it. Under that section now repealed it was held in *R. v. Holden* (1), that a partner who with intent to defraud and without lawful excuse or authority accepted a bill in the partnership name had accepted it in the name of another person within the meaning of that statute and the distinction was sometimes a very fine one as will be seen from the decision of the English Court of Appeal in *Morrison v. London County and Westminster Bank Ltd.*, (2). On behalf of the respondent reliance was placed on the decision of *R. v. Warburton* (3). As will be apparent from the judgment of Cockburn C.J. in that case the ratio of the decision is that it is a criminal offence to deprive a partner of his interest in some of the partnership property by false entries and false documents. That is quite understandable because by falsifying entries a partner's interest in the partnership property is affected forthwith irrespective of dissolution of general accounts and this case therefore is no authority for the proposition that a partner can be convicted of criminal breach of trust by another partner in respect of partnership property. Besides it was a case of conspiracy to cheat and defraud and it was immaterial whether the act agreed to be done was itself not criminal, so long as it was illegal. It is so also for criminal conspiracy under section 120A of the Indian Penal Code. Incidentally it may be pointed out here that although at Common Law in England it was not a criminal offence for one co-owner of goods fraudulently to deprive the other co-owners of them, such co-owner being lawfully in possession (4) it was nonetheless possible that if he took them from a person who was a bailee for all the co-owners he could be convicted of larceny even though the bailee was himself one of the co-owners [*R. v. Brahmley* (5) and *R. v. Woobster* (6)] and that apparently is still the law in any case which cannot be brought within the Larceny Act of 1916. But these in my opinion cannot alter the position of the partners *inter se* in respect of partnership property so as

(1) [1912] 1 K B 483.

(2) [1914] 3 K.B. 356 (381)

(3) (1870) L R. 1 C.C.R. 274

(4) 1 Hale P.C. 513.

(5) (1822) Russ & Ry 478 C.C.R

(6) (1861) Le & Ca. 77 C.C.R.

to make one partner liable for the offence of criminal breach of trust in respect of partnership property at the instance of another partner.

CRIMINAL.

1951.

Bhuban Mohan  
Das  
v.  
Surendra Mohan  
Das  
Mukharji, J

The question before the Court in India can be dealt with in my view on the basis of the language used in section 405, I.P.C., dealing with the offence of the criminal breach of trust. In this respect the matter is largely if not wholly one of construction. The generality and the amplitude of the expression "whoever" in section 405 of the Indian Penal Code *prima facie* would include a partner within the operation of this section. If there is any exclusion of the case of a partner from the operation of this section then such exclusion has to follow from other expressions used in that particular section. Such other expressions which are relevant in this context and from which such exclusion can be deducted are:—

- (i) "In any manner entrusted with property."
- (ii) "Any dominion over property."
- (iii) "To his own use."
- (iv) "In violation of any direction of law prescribing the mode in which such trust is to be discharged."
- (v) "Or of any legal contract expressed or implied."

The first question therefore for consideration is can a partner be said to be in any manner entrusted with partnership property as against the other partner or partners. In my view normally not. Section 15 of the Partnership Act provides subject to any contract that the property of the firm shall be held and used by the partners exclusively for the purposes of the business. That in my view means all the partners as between themselves jointly hold and use the partnership property for the purposes of the business and no one partner can be said to be entrusted with the partnership property as against the other partner or partners under the ordinary incidents of partnership law under the Partnership Act.



CRIMINAL.

—  
1951.

Bhuban Mohan

v. Das

v.

Surendra Mohan

Das

—  
Mukharji, J.

The second question is can a partner be said to have dominion over the partnership property as against the other partners? The same section 15 of the Partnership Act in my judgment precludes such idea. In the case of a partnership it is joint dominion by all the partners over the partnership property.

These are the two primary conditions one of which must be satisfied before other elements of the offence under section 405, I.P.C., need be considered. As in my view these two primary conditions cannot be satisfied in the case of a partner under the ordinary incidents of partnership law under the Partnership Act, no partner can prosecute his co-partner for criminal breach of trust in respect of partnership property.

The other expressions mentioned in what I have itemised above as (3) (iii), (iv) and (v) may be applicable in the case of a partner against the co-partners in respects of partnership property under the Partnership Act but they are of no avail when any of the first two basic conditions of the offence cannot under such law be satisfied.

It is quite true that section 15 of the Partnership Act as well as many other sections thereof are subject to any special contract between the partners. Great liberty is given to partners to form their own contract of partnership and the terms of contract vary between one partnership and another. If therefore there is any special contract of partnership by the very terms of which either an entrustment is made of any specific property to another partner or any exclusive dominion given in respect of the same to one particular partner as against the others then such a case may in appropriate circumstances come within the operation of section 405, I.P.C. Except such kind of special contract therefore there cannot be criminal breach of trust by one partner as against the other in respect of partnership property.

What is often forgotten in this context is that the Indian Partnership Act is not a complete code on the law of partnership. It is a statute to define and amend the law relating to partnership. The Act does not profess to consolidate the entire law on the subject. Until dissolution of partnership and accounts no specific item of property belongs to any particular partner as

against the other. That is the peculiar character and incident and nature of partnership property. Section 48 lays down that in settling account of a firm after dissolution losses shall first be paid out of profits, next out of capital and lastly by the partners individually in proportions in which they are entitled to share profits. Then it is provided there that the assets of the firm should be applied first in paying debts of the firm to third parties, then in paying rateably what is due to a partner from the firm for advance as distinguished from capital, thirdly in paying to each partner rateably what is due to him on account of capital and lastly the "residue" if any shall be divided among the partners in the proportions in which they are entitled to share profits. The basic idea is ultimate participation in the partnership assets out of the "residue" that is left and such "residue" cannot be determined until after dissolution and accounts and until after losses and assets of the firm have been attended to in the manner laid down in the section. The same idea operates also in the section 52 of the Indian Partnership Act where a contract creating partnership is rescinded on the ground of fraud or misrepresentation of any of the parties thereto. There again the party entitled to rescind has the right to a lien on or a right of retention of the "surplus" of the assets of the firm remaining after debts of the firm have been paid, for any sum paid by him for the purchase of share in the firm and for any capital contributed by him. He is also entitled to rank as a creditor of the firm in respect of any payment made by him towards the debt of the firm and to be indemnified by the partner or partners guilty of fraud or misrepresentation against all debts of the firm. From these various provisions it is therefore clear that the property of partners in the partnership assets is a residuary or surplus property which remains after satisfaction of other claims on the firm. It is therefore not a specific and ascertainable property until then.

The reason therefore of holding that a partner cannot be prosecuted by another partner for criminal breach of trust in respect of partnership property under section 406 I.P.C., is twofold. The nature, character and incident of partnership property are such that during the subsistence of the partnership there cannot be, except by special agreement with which we are not concerned here, any entrustment or dominion and secondly

CRIMINAL.

1951.

Bhuban Mohan  
Das  
v.  
Surendra Mohan  
Das  
Mukharji, J.

CRIMINAL.      partnership property is not a specific and ascertainable property,  
—      and is of so equivocal and problematic a nature until dissolu-  
1951.      tion of accounts, that it is not susceptible to be used in a  
Bhuban Mohan      manner which can bring into operation section 405 of the  
Das      Indian Penal Code. It is only when such ordinary character  
v.      and nature of the partnership property are varied by special  
Surendra Mohan      contract of partnership so as to create entrustment of any  
Das      specific property in favour of one partner as against the others  
—      or so as to give exclusive dominion of such property to one  
Mukharji, J      partner as against the other that there can be any scope of  
application of section 405, I.P.C.

S.D.G.

*Rule made absolute.*

## ORIGINAL CIVIL.

*Before Mr. Justice D. N. Sinha.*

CIVIL.

1951.

March, 22.

ELAHI BUX

v.

UNION OF INDIA

*Indian Independence Order, 1947, Art. (8(1))—Rights and liabilities under a contract—Whether Pakistan or Union of India is liable under the contract—Principles determining liability.*

The principles which determine whether liability under a contract is that of the Dominion of Pakistan or that of the Union of India, are as follows:—

- (1) Arts. 8(1) and (2) of the Indian Independence Order, 1947, contemplate contracts entered into on behalf of the Governor-General in Council, which on the appointed day, are either executed, continuing or executory:
- (2) In the case of a continuing or executory contract, if the Dominion of Pakistan was going to be exclusively interested in it, either because the subject matter of it was situated in its territory, or if it was to be performed for its benefit, or if it solely related to its affairs, then the liability would be of the Dominion of Pakistan. In such a case, not only the present and future liabilities would be her, but also all past liabilities as had accrued due.
- (3) In the case of executed contracts, the Dominion of Pakistan will be liable if:—
  - (a) She would have been similarly interested in the subject matter of the contract, imagining that she had come into existence as a separate state, at the time the contract was entered into, and/or was being implemented or
  - (b) She would have been similarly interested in the subject matter of the contract imagining that the subject matter of the contract existed on the "appointed day", whether in fact it existed or not,

\* Original Civil Suit No. 2294 of 1947.

CIVIL.

—  
1951.

Elahi Bux

v.

Union of India  
—

Suit against the Governor-General in Council, in or about the 11th day of August 1947 for a decree for Rs. 62,562 and other reliefs.

The material facts will appear from the judgment.

*Mr. S. Masood* for the Plaintiff.

*Mr. R. C. Deb* for the Defendant.

The judgment of the Court was as follows:—

*March, 22.*

**D. N. Sinha, J.:**—This is a suit which was filed by the plaintiff against the Governor General in Council, in or about the 11th day of August 1947, for a decree for Rs. 62,562/- and other reliefs. The plaintiff is a military contractor and entered into a contract with the military authorities on or about the 12th November, 1943, for the construction of various works at Comilla, including latrines for the use of the military forces. The plaintiff executed the said contracts, and it is stated in the plaint that the bill was duly submitted to the Commander Royal Engineers, at Chittagong, on the 15th December, 1945. This bill has not been paid. The suit was originally filed against the Governor-General in Council. On the 15th March 1950, the plaintiff made an application for amending the cause-title and body of the plaint, by substituting the "Union of India" in the place and stead of the Governor-General in Council. On the 27th April 1950, an order was made by Bachawat, J. ordering substitution and further directing as follows:—That this suit be placed on the peremptory list of suits, after one month from the date hereof, for trial of the following preliminary issue viz., "as to whether or not the liability, if any, of the Governor-General of India in Council, in respect of the cause of action alleged in this suit, has devolved upon the Dominion of India or its successor, the Union of India." This preliminary issue has now come before me to be tried. The plaintiff has gone to the box and tried to give evidence of what happened to the constructions at Comilla. He however could only say about it from what he heard from others, who were not called. This is no evidence and I cannot accept it. The defendant has called no evidence. The point

has therefore to be decided as a point of law. Both parties agree that the decision of the issue rests on the construction of Article 8(1) of the Indian Independence Order 1947 which runs as follows:—

“8(1) Any contract made on behalf of the Governor-General in Council before the appointed day shall, as from that day—

(a) if the contract is for purposes which as from that day are exclusively purposes of the Dominion of Pakistan, be deemed to have been made on behalf of the Dominion of Pakistan instead of the Governor-General in Council; and

(b) in any other case, be deemed to have been made on behalf of the Dominion of India instead of the Governor-General in Council;

and all rights and liabilities which have accrued or may accrue under any such contract shall, to the extent to which they would have been rights or liabilities of the Governor-General in Council, be rights or liabilities of the Dominion of Pakistan or the Dominion of India as the case may be.”

The “appointed day” was the 15th August 1947.

Mr. Masud appearing on behalf of the plaintiff, argues that on the appointed day, the contract had already been executed and as such, there could not be a purpose on that day. According to him, the purpose of an executed contract is the original purpose, which existed when the contract was actually being implemented. As this contract was for military purposes which, at the time of entering into the contract and during the period, it was being carried out, was not exclusively for the purposes of the Dominion of Pakistan it came under the residuary liability under 8(1) (b), and the Union of India was liable.

I am unable to accept the argument that Article 8(1) (a) does not apply to an executed contract. There might have been some scope for such an argument if we did not have the

Civil.

1951.

Elahi Bux

v.

Union of India

Sinha, J.

CIVIL.

1951.

Elahi Bux

v.

Union of India

Sinha, J.

concluding paragraph of Article 8(1). This paragraph makes it quite clear that rights and liabilities which have already accrued under a contract, are to be taken into consideration. This is also clear from a perusal of Article 8(5).

This aspect of the question was considered by Mr. Justice S. B. Sinha, in *Shaik Serajuddin Batley v. Province of West Bengal* (1). The learned Judge made the following observation:—

“Paragraph 8(2) provides that if the contract was entered into on behalf of the Province of Bengal, for purposes which are exclusively purposes of the Province of West Bengal (as from the appointed day) the following consequences ensue:—

(a) the contract (which was originally entered into on behalf of the Province of Bengal) shall be DEEMED TO HAVE BEEN ENTERED INTO on behalf of the Province of West Bengal

(b) the rights and liabilities which have accrued or may accrue under any such contract shall be rights and liabilities of the Province of West Bengal.

This clearly means that by a legal fiction the Province of West Bengal is, so to say, substituted as a party to a contract from the time the contract was made on behalf of the Province of Bengal. The result is that, if the contract is executory; the Province of Bengal becomes liable to perform and entitled to call for performance of the contract and the rights and liabilities which may accrue under the contract become its rights and liabilities. If the contract has been executed in whole or in part, and rights and liabilities have accrued under the contract before the appointed day, the province of West Bengal becomes entitled to such rights and responsible for such liabilities.”

The learned Judge then proceeded to consider Article 8(5) and said “There is nothing in paragraph 8(2), to limit its operation to subsisting and executory contract.” Although the observations related to Article 8(2), they apply with equal

(1) Unreported judgment dated 4-8-49 in Suit No. 1502 of 1948.

CIVIL.

1951.

Elahi Bux

v.

Union of India

Sinha, J.

force to Article 8(1), the wordings being similar. The judgment of Sinha J. has since been upheld by the court of appeal, but I am informed that there has been a further appeal to the Supreme Court. If we are to use the legal fiction that the contract would be deemed to have been entered into by the Union of India or Eastern Pakistan as the case may be, then it is clear that for constructions to be built for military forces at Comilla, the contracting party must be the Dominion of Pakistan, in whose territory, it lies. It has been pertinently pointed out on behalf of the defendants that it is not strictly accurate to speak of the contract as an executed contract. A contract has two aspects. The contractor does the work and the Government pays. These are mutual obligations under the contract and until payment has been made, it cannot be said that the contract has been fully executed, or that it is at an end. That is why, the Article speaks of liabilities which have "accrued" under a contract. If the Union of India is to accept such a liability, then it must be shown that on the appointed day, the purpose was not exclusively that of the Dominion of Pakistan. It will not do to say that the liability exists but the purpose does not exist. Either of two legal fictions will have to be introduced. Either, imagine that at the time the contract was entered into, both the Union of India and the Dominion of Pakistan existed, and then consider whether the purpose of the contract would have been exclusively for the Dominion of Pakistan or not, or alternatively imagine the contract as being implemented on the appointed day and consider whether on that day it would be for the purposes exclusively of the Dominion of Pakistan or not. In the case just referred to, and in the case of *Province of West Bengal v. Midnapore Zemindary Co., Ltd.* (1) the dispute arose regarding the rent of properties which after the appointed day were situated in the State of West Bengal and were in their occupation. In such a case the matter is much more simple. In the latter case, Harries, C.J. said as follows:—

"As I have said earlier, it was never the case of the Provincial Government that this hospital which was housed in the house in question (in the Murshidabad District) served any district which is now part of Eastern Pakistan

It seems to have been assumed in the

(1) (1949) 85 C.L.J. 203.



CIVIL.

1951.

Elahi Bux

Union of India

Sinha, J.

court below that before partition the hospital was maintained exclusively for the purpose of certain districts which on partition fell to West Bengal and if that be so I think there can be no doubt whatsoever the Article 8(2)(a) of the Indian Independence Order applies and that West Bengal would be liable . . . . ."

In this case, however, the facts are much more complicated. But it is not disputed that the work was done at Comilla which is in the Dominion of Pakistan. If by a legal fiction, the Dominion of Pakistan existed at the date of the contract, or the contract existed on the appointed day, when Eastern Pakistan has certainly come into existence, then in either case, only the Dominion of Pakistan would be interested in the constructions for military forces stationed at Comilla and must pay for the same. An attempt was made by the plaintiff to prove that on the appointed day these latrines etc. had been demolished or no longer existed. As I have said, he had failed to prove this. But to my mind, this is not at all relevant. The position analysed comes to this:—

(1) Article 8(1) & (2) of the Indian Independence Order 1947 contemplate contracts entered into on behalf of the Governor General in Council, which on the appointed day, are either executed, continuing or executory.

(2) In the case of a continuing or executory contract, if the Dominion of Pakistan was going to be exclusively interested in it, either because the subject matter of it was situate in its territory, or if it was to be performed for its benefit, or if it solely related to its affairs, then the liability would be of the Dominion of Pakistan. In such a case, not only the present and future liabilities would be her but also all past liabilities as had accrued due.

(3) In the case of executed contracts, the Dominion of Pakistan will be liable if:

(a) she would have been similarly interested in the subject matter of the contract, imagining that she had come

into existence as a separate state, at the time the contract was entered into, and/or was being implemented or

(b) she would have been similarly interested in the subject matter of the contract, imagining that the subject matter of the contract existed on the 'appointed day', whether in fact it existed or not.

CIVIL.

1951.

Elahi Bux

v.

Union of India

Sinha, J.

Applying these tests I must come to the conclusion that it is the Dominion of Pakistan and not the defendant who is liable to pay the bill of the plaintiff, which is the subject matter of the suit. The issue is therefore answered in the negative. It is conceded that the result of the suit depends upon the result of this issue and the suit accordingly fails and must be dismissed with costs.

*Mr. A. Rashid:* Solicitor for the Plaintiff.

*Mr. S. K. Mondal:* Solicitor for the Defendant.

S.K.R.C.

*Suit dismissed with costs.*

## ORIGINAL CIVIL.

*Before Mr. Justice H. K. Bose.*

CIVIL.

1951.

February, 22.

MAJOR SOAP CO. LTD.

v.

ASSISTANT COMMISSIONER OF COMMERCIAL  
TAXES, CALCUTTA.\*

*Writ of Mandamus—Constitution of India—Art. 226—Whether available in cases where efficacious and adequate remedy is provided in the Act and where there has been no refusal to exercise jurisdiction nor any excess of jurisdiction.*

*Bengal Finance (Sales Tax) Act, 1941—Section 15—Rule 71—Repeal of section 18 by Ordinance X of 1950—Delegation of powers—Validity.*

*Bengal Finance (Sales Tax) Act, 1941, Section 17—Transferee of the whole of the undertaking, if comes within the meaning of Section 17.*

An application for writs under Article 226 of the Constitution of India is misconceived where there is adequate and efficacious remedy available to the applicant under provisions of the Bengal Finance (Sales Tax) Act for remedy against order of the Commercial Tax Officer requiring the applicant to produce books of accounts of a period prior to its registration as a 'dealer'.

Repeal of section 18 of the Bengal Finance (Sales Tax) Act 1941 by Ordinance X of 1950 does not affect the powers of the Commissioner to delegate any of his powers under section 15 subject to Rule No 71 and the Rules framed under provisions of the Act.

Where whole of the undertaking or enterprise has been transferred although a portion of assets and liabilities of the transferor have been excluded from the scope of transfer—*Held*—the business has been transferred and the transferee comes within the meaning of section 17 of the Bengal Finance (Sales Tax) Act and as such is a dealer.

Application under Art. 226 of the Constitution of India for cancelling or quashing a requisition calling upon the Petitioner to produce books of accounts and records for the assessment of sales tax.

The material facts will appear from the judgment.

*Messrs. E. R. Meyer and D. K. Sen* for the Applicant.

*Messrs. S. M. Bose* (Advocate General) and *A. K. Sen* (Jr. Standing Counsel) for the Respondent.

\* Matter No. 101 of 1950. Application under Article 226 of the Constitution of India.

The judgment of the Court was as follows:—

**H. K. Bose, J.:**—This is an application under Article 226 of the Constitution for Writs in the nature of Mandamus, Prohibition or Certiorari for cancelling or quashing a Requisition calling upon the petitioner to produce books of accounts and records for the purpose of assessment of sales tax in respect of certain periods mentioned in the petition.

CIVIL.  
—  
1951.  
Major Soap  
Co. Ltd.  
v.  
Assistant  
Commissioner of  
Commercial  
Taxes, Calcutta.

The petitioner is a Company having its registered office at 25, Zakaria Street, Calcutta. The Company was registered on the 28th May 1948 and obtained Certificate of commencement of its business on the 31st May 1948 and got itself registered as a dealer under the Bengal Finance Sales Tax Act 1941 on the 21st July 1948. The petitioner has acquired and taken over as a going concern the business of Major Soap Company which was a proprietary concern including the stock in trade, machinery, furniture and goodwill etc. but neither the assets nor the liabilities and states that it is not a "transferee" within the meaning of Section 17 of the Bengal Sales Tax Act nor is it a "dealer" within the meaning of the definition in the Act, and it has been registered as a dealer and transferee under a misapprehension as to its correct status. The Company asserts that it is not a transferee as the assets and liabilities of Major Soap Company have not been transferred to it.

February, 22.

On the 12th April 1950 the Commercial Tax Officer, Colootola Charge, required the petitioner to produce books of accounts and records for the purpose of assessment of Sales Tax in respect of four quarters ending 31-3-48 and four quarters ending 31-3-49.

It appears that Section 18 of The Sales Tax Act 1941 has been repealed by an Ordinance promulgated by the Government of West Bengal being Ordinance X of 1950.

On the 14th September 1950 the Assistant Commissioner Commercial Taxes, Calcutta (South) by a requisition fixed the 2nd November 1950 for assessment of taxes for four quarters ending 31-3-48 and for four quarters ending 31-3-49.

CIVIL.

1951.

Major. Soap  
Co. Ltd.

v.

Assistant  
Commissioner of  
Commercial  
Taxes, Calcutta.

Bose, J.

The petitioner charges that these acts are without jurisdiction and *ultra vires*. It is contended by Mr. Meyer the learned counsel for the petitioner that as the assets and liabilities of the business have not been transferred he is not a transferee of the business. This contention is fallacious and cannot be accepted. A business is a mercantile pursuit or a trading concern. A dealer as defined in Section 2 (c) of the Act is a person engaged in the business of selling or supplying goods. When the full rights in that business of selling or supplying goods is transferred to another person the latter becomes a transferee within the meaning of Section 17 of the Act. It appears that the petitioner company has acquired by virtue of the transfer the right to carry on the business, the stock in trade, machinery, furniture and goodwill and etc. In fact everything that is comprised in the connotation of a business has been assigned to the petitioner and the words "etcetra" bring in, any other thing in relation to the business that may not have been specifically mentioned, excluding of course anything that is expressly excluded from the operation or scope of the transfer. The expression "neither the assets nor the liabilities of the proprietor" has the effect of keeping out assets such as book debts due to the transferor or cash at the Bank and also all liabilities. But the whole of the undertaking or enterprise has been transferred and because a portion of the assets or the liabilities are excluded from the scope of the transfer that does not prevent the ownership of the business passing and divesting the transferor of its ownership therein. I hold that the petitioner is a transferee within the meaning of Section 17 of the Act and as such a "dealer" within the meaning of the Act.

The next point urged was that the expression "any tax payable in respect of such business remaining unpaid" means tax which has already been assessed and the amount ascertained or determined and remaining outstanding or unpaid, and not tax which has not been assessed at the time of or before the transfer. This argument also appears to be based on a misapprehension of the scheme of the Act and of the true nature of the implications of the various sections of the Act.

Section 4 of the Act creates the liability to pay the tax, in other words the tax becomes payable by virtue of this Section.

Section 7 imposes duty to obtain and possess registration certificate. Section 10 lays down the mode of payment of tax. If the mode prescribed is not observed by the person liable to pay the tax the Commissioner may proceed to assess tax to the best of his judgment (Section 11). The question whether the amount of the tax is ascertained or not is immaterial and irrelevant. If the liability to pay the tax is there and such liability remains unsatisfied then the transferee becomes saddled with liability to pay such tax no matter whether the ascertainment or assessment was made or not. This is the plain implication of Section 17.

CIVIL.  
—  
1951.  
Major Soap  
Co. Ltd.  
v.  
Assistant  
Commissioner of  
Commercial  
Taxes, Calcutta.  
—  
Bose, J.

The petitioner has got itself registered under the Act as a transferee and dealer and that registration stands and has not been cancelled. The petitioner has not applied or taken steps for cancellation. So long as it remains on the register it cannot escape liability to pay the tax.

It was contended that by reason of the repeal of the Section 18 of the Act by the Ordinance of 1950 there is no authority or officer to determine the question whether the petitioner is a dealer or not and so the petitioner is entitled to move this Court.

But under section 15 of the Act the Commissioner can now delegate any of his powers to any person appointed to assist him, including his functions under Section 18; now that Section 18 is out of the way as a result of the repeal, subject of course to restrictions contained in Rule 71. Under Rule 71 the matter of registration of a dealer, amendment of certificate of registration or cancellation of registration can be delegated to Commercial Tax Officer, and it has been so done.

Section 20 and Rule 74 make provisions for appeals, revision and review. Section 21 of the Act provides for statement of case to High Court.

Thus there is efficacious and adequate remedy under the Act. It is idle to suggest that by virtue of repeal of Section 18 the petitioner is without any remedy.

CIVIL.

—  
1951.  
—Major Soap  
Co. Ltd.  
v.Assistant  
Commissioner of  
Commercial  
Taxes, Calcutta.  
—

Bose, J.

The petitioner described itself through its pleader as transferee and was registered as dealer as a matter of course. No question whether it was a transferee or not or dealer or not at all arose for determination.

There has been no refusal to exercise jurisdiction nor any excess of jurisdiction.

The application is wholly misconceived. The petition therefore fails and the Rule must be discharged with costs.

Mr. P. C. Basu: Solicitor for the Petitioner.

S.D.G.

*Rule discharged.*

## CIVIL REVISION.

*Before Mr. Justice B. K. Guha.*

CIVIL.

—  
1951.  
—

January, 17.

MOHAN LAL KHETTRY

v.

CHUNILAL KHETTRY.\*

*Article 227 of the Constitution of India, its application in ordinary cases—Section 18 of the West Bengal Premises Rent Control Act 1950 and Section 5 of the West Bengal Act LXII of 1950—Construction of the expression 'Decree for recovery of possession' as in Section 18—Meaning of the word "Pending" in Section 5.*

On 12-5-49, the landlord M. filed suit against C under section 41 of the Presidency Small Causes Court Act for determination of tenancy for nonpayment of rent. On 4-1-50 an order was passed by the Small Causes court for delivery of possession on 30-4-50 in favour of the landlord M. In the meantime, the West Bengal Premises Rent Control Act of 1950 came into force and on an application by the tenant C, the order for possession was set aside under section 18(1) of the said Act

*Held that* —(1) Decree for recovery of possession in section 18 of the 1950 Act should be broadly construed so as to include an order for recovery of possession under Chapter VII of Presidency Small Causes Court Act, 1882

(2) A cause is said to be pending in a Court of Justice when any proceeding can be taken in it.

\* Civil Revision Case No. 889 of 1950 against the order in Suit No. 5637 of 1949 of the Presidency Small Causes Court Calcutta.

(3) One is entitled to the benefit of retrospective operation of section 5 of the Rent Control (Temporary provisions) Amendment Act 1950 so long as the cause is pending in a Court of Justice and not finally disposed of.

CIVIL.

1951.

Cases relied on—*Rai Bahadur Atulya Dhan Banerji v. Sudhangshu Bhushan Dutt* (1); *Fordhan v. Clagget* (2); *Santosh Kumar Das v. Nripendra Kumar Chowdhury* (3).

Mohan Lal  
Khettry

v.

Chunilal Khettry

Application by the landlord under Sec. 115 C. P. Code for revision of an order passed by a Presidency Small Causes Court Judge.

The material facts will appear from the judgment.

*Mr. B. C. Dutt* for the Petitioner.

*Messrs Satya Charan Pain and Hem Chandra Dhar* for the Opposite Party.

The judgment of the Court was as follows:—

**B. K. Guha, J.**—This is an application by the landlord substantially under section 115 of the Code of Civil Procedure for revision of an order passed by a Presidency Small Causes Court Judge on the 28th June 1950. Article 227 of the Constitution was also mentioned in the heading of the application but that article has hardly any application in the circumstances of the present case and as such I proceed to decide the matter only under section 115 of the Code of Civil Procedure.

January, 17.

The facts which have given rise to the present application are briefly as follows: The opposite party was a tenant under the present petitioner. On the 12th May 1949, the petitioner filed proceedings under section 41 of the Presidency Small Causes Court Act against the opposite party for eviction on the ground of *ipso-facto* determination of the tenancy for non-payment of rent. On the 4th January 1950 the Lower Court passed an order in favour of the present petitioner granting his prayer and directing the opposite party to deliver possession on the 30th April, 1950. In the meantime the West Bengal Premises Rent Control Act of 1950 came into force and the present opposite party applied before the learned Judge under section 18 of that Act for vacating the order for possession. By

(1) (1950-51) 55 C.W.N. 343.

(2) (1882) 20 Ch. D. 637.

(3) [1949] A.I.R. Calc. 430 F.B.



CIVIL.

1951.

Mohan Lal  
Khettry

v.

Chunilal Khettry

Guha, J.

his order dated the 28th June 1950 the learned Judge allowed the application under section 18(1) of the Act and set-aside the order for possession.

On behalf of the landlord petitioner, it is contended before me that in the circumstances of the present case, section 18(1) of the Act of 1950 has no application inasmuch as the order for possession passed by the learned Judge on the 4th January 1950 was not a decree within the meaning of that section. So far as this objection is concerned, the matter fell for decision in a very recent case, namely the case of *Rai Bahadur Atulya Dhan Banerjee v. Sudhangshu Dutta* (1) where a Division Bench of this Court has ruled that the expression "Decree for recovery of possession" in section 18 of the 1950 Act should be broadly construed so as to include an order for recovery of possession under Chapter VII of the Presidency Small Causes Court Act, 1882. That recent Bench decision is binding upon me and following that decision I overrule the first objection.

Secondly, it has been urged before me on behalf of the petitioner that as the application under section 18 was disposed of by the Lower Court on the 28th June 1950 before the recent amendment by the West Bengal Premises Rent Control (Temporary Provisions) Amendment Act 1950, that is the West Bengal Act LXII of 1950 came into force the tenant is not entitled to the benefit of the retrospective operation of section 5 of that amending act. Section 5 of the amending act lays down that in all applications made under Sub-section (1) of section 18 of the West Bengal Premises Rent Control Act, 1950, latter act as amended by the amending act shall apply and shall be deemed to have applied. The question for determination therefore is whether in view of the fact that the application under section 18 was disposed of by the Lower Court on the 28th June, 1950 the tenant is entitled to the benefit of section 5 of the amending act at this stage. The present revisional application was filed on the 14th July, 1950, before the amending act came into force. It has been argued on behalf of the tenant opposite party that as the Revision case is pending in this court upto this day, the tenant is entitled to the benefit of section 5 of the amending act. Everything really turns upon the correct interpretation of

(1) (1950-51) 55 C.W.N. 343.

the word 'pending' which appears in section 5. In an English case, namely *In re: Claggets "Estate," Fordham v. Clagget* (1) the word "pending" was construed in the following way: a cause is said to be pending in a court of Justice when any proceeding can be taken in it. That is the test. If you can take any proceeding it is pending. This interpretation of the word 'pending' was quoted with approval in the Full Bench Case of *Santosh Kumar Das v. Nripendra Kumar Roy Choudhury*, (2). Upon this interpretation of the word "pending", it is quite clear that the application under section 18 though it has been disposed of by the trial court is pending so far as this court of revision is concerned inasmuch as it is awaiting adjudication in this court. In this view of the matter, I am of opinion that the tenant is entitled to the benefit of section 5 of the amending Act.

CIVIL.  
—  
1951.  
Mohan Lal  
Khettry  
v.  
Chunilal Khettry  
—  
Guha, J.

In the result, the Rule is discharged. In the circumstances of this case, I make no order as to costs.

R.M.

*Rule discharged.*

(1) (1882) 20 Ch. D. 637 at p 653.

(2) A.I.R. [1949] Calc. 430 (F.B.).

## APPEAL FROM ORIGINAL CIVIL.

*Before Sir Arthur Trevor Harries Kt., Chief Justice  
and Mr Justice S. N. Banerjee.*

CIVIL.

RESIDENCE LIMITED.

v. —

1951.

SURENDRA MOHAN BANERJEE AND OTHERS.\*

April, 20.

*West Bengal Premises Rent Control Act (XVII W. B. of 1950)—Fixation of  
standard rent under the Act—Rent whether includes the payment for  
services rendered by the landlord—Written agreement for tenancy—  
“Rent,” meaning of*

A premises was let out by a written agreement and by the terms of the Tenancy Agreement the landlord was bound to provide the tenant with electricity for various purposes, hot water, the services of a lift and free services of sweepers, plumbers, carpenters, electricians and durwans and watchmen. The premises was let out furnished. The tenant respondent made an application before the Rent Controller for fixation of standard rent under Rent Act, 1950. The appellant took the point that the Rent Controller had no jurisdiction to entertain the application or to determine the standard rent. The application of the landlord was dismissed by both the Rent Controller and the District Judge on appeal. Thereafter the appellant made an application before Bose J. under Article 226 of the Constitution and Section 45 of the Specific Relief Act which was dismissed. Question arose whether the Rent Controller had jurisdiction to fix the standard Rent of the premises which includes payment for the service rendered by the landlord.

*Held that—*(i) The word “rent” is not defined in the Act and therefore it must be given its ordinary grammatical meaning.

(ii) That the premises can be let with services and still be premises within the meaning of the Rent Act of 1950, is clear from the provisions of a number of sections of the Act e.g. Sections 34, 38, and 41 of the Act.

(iii) It is quite clear from these sections that the framers of the Rent Act 1950, clearly contemplated that a tenancy which carries with it certain amenities was within the purview of the Act.

\* Appeal from Original Order No. 53 of 1951 against the order of Bose J. passed on an application under Article 226 of the Constitution.

- (iv) When a flat is let, with the landlord agreeing to provide certain free services what is paid as rent under the agreement is paid for the flat together with the benefits of the landlord's covenants and that payment is at common law in England and under ordinary tenancy law in India, the rent of the premises and must be regarded as the "rent" of the premises as that term is used in the Rent Control Acts.

CIVIL.

1951.

Residence Ltd.

v.

Surendra Mohan  
Banerjee.

Appeal by the landlord applicant.

The material facts will appear from the judgment.

*Mr. Niren De*, for the Appellant.

*Messrs. A. K. Sen and Sukriti Ganguly* for the tenant Respondent *W. C. Reid*.

*Mr. S. M. Bose* (Advocate General) with *Mr. S. Banerjee* (Standing Counsel) for the Rent Controller Respondents.

The judgment of the Court was as follows:—

**Harries, C.J.:**—This is an appeal from a judgment and order of *Bose J.* made on an application under Article 226 of the Constitution. The appellant applied to this Court for the issue of writ of certiorari or prohibition for quashing or prohibiting certain proceedings for the fixation of standard rent of premises initiated by a tenant and then pending before the Rent Controller of Calcutta. There was an alternative prayer for an order on the parties under section 45 of the Specific Relief Act. *Bose J.* came to the conclusion that there was no force whatsoever in the contentions of the appellant landlord and he accordingly dismissed the application in its entirety. From that order this present appeal has been preferred.

April, 20.

The appellant is the lessee of a large block of flats known as 209, Lower Circular Road. The appellant was the tenant of these flats under a trust estate and one of the 145 flats comprised in the building was sublet to the respondent *W. C. Reid*. The flat was let to *Mr. Reid* at a rent of Rs. 190/- p.m. and by the terms of the tenancy agreement the appellant was bound to

CIVIL.  
 ———  
 1951.  
 ———  
 Residence Ltd.  
 v.  
 Surendra Mohan  
 Banerjee.

Harries, C J.

provide the tenant with electricity for various purposes, namely, lights, fans, cooking stoves, refrigerators, irons, radios or radio-grams and also with hot water, the services of a lift and free services of sweepers, plumbers, carpenters, electricians, durwans and watchmen. The flat was let furnished and it would appear that the landlord was bound to execute repairs and to renew the furniture and fittings when the latter became deteriorated.

On December, 18, 1950 the tenant respondent made an application in the court of the Rent Controller, who has been made a party to these proceedings, for fixation of the standard rent under the provisions of the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. The appellant applied to the court of the Rent Controller for dismissal of the tenant's application on the ground that the Rent Controller had no jurisdiction to entertain the application or to determine the standard rent. On January, 17, 1951 the Rent Controller rejected the application of the appellant and ultimately transferred the case to the Additional Rent Controller who has also been made a party in these proceedings, for disposal.

On January 20, 1951, the appellant appealed from the order of the Rent Controller to the District Judge of 24 Parganas and application was made to the learned District Judge for a stay of all proceedings, but the application was refused. It is to be observed that the learned District Judge has not yet decided the appeal.

When a stay of proceedings was refused by the learned District Judge an application for prerogative writs was made in this court which was ultimately disposed of by Bose J.

It has been contended before Bose J. and it has again been contended before us that the Rent Controller had no jurisdiction whatsoever to entertain this application for fixing the standard rent. In the alternative it is contended that if the Rent Controller has jurisdiction, he has only jurisdiction to fix the standard rent of the premises which would not include any payment for the services rendered by the landlord applicant. It is suggested that if the Rent Controller has any jurisdiction he would have to consider what part of the sum of Rs. 190/-

constituted a payment for the furnished premises apart from the services and what part constituted a payment for the services. The suggestion is that only such part of Rs. 190/- as could be rightly attributed to the premises and furniture should be regarded as rent for the purposes of fixing the standard rent.

Civil.  
—  
1951.  
Residence Ltd.  
v.  
Surendra Mohan  
Banerjee.  
—  
Harries, C J.

Bose J. rejected these contentions and held that Rs. 190/- constituted the rent of the premises. The premises had been let by a written agreement and by the terms of the agreement the landlord had covenanted to perform certain acts or services for the payment of a lump sum as rent of the premises. That being so Bose J. was of opinion that the rent at which these premises were let was Rs. 190/- and that the Rent Controller had jurisdiction to ascertain and fix the standard rent.

“Premises” are defined in the Act by section 2(8) in these terms: “Premises means any building or part of a building or any hut or part of a hut let separately and includes—

- (a) the gardens, grounds and out-houses (if any) appertaining to such building or part of a building or hut or part of a hut,
- (b) any furniture supplied or any fittings affixed by the landlord for use of the tenant in such building or part of a building or hut or part of a hut,

but does not include a room or part of a room or other accommodation in a hotel or lodging house.”

“Hotel or lodging house” is defined in section 2(3) of the Act. But it is not necessary to consider this definition because it is not contended in this case that the flat concerned is a room or rooms in a hotel or lodging house.

“Standard rent” is defined in section 2(10) of the Act in these terms:

“Standard rent” in relation to any premises means—

- (a) the standard rent determined in accordance with the provisions of Schedule A,

CIVIL

1951.

Residence Ltd.

v.

Surenbra Mohan  
Banerjee.

HARRIES, C.J.

(b) where the rent has been fixed under section 9, the rent so fixed; or at which it would have been fixed if application were made under the said section;"

Section 8 deals with the fixation of standard rent by the Rent Controller.

It is to be observed that the word "rent" is not defined in the Act and therefore it must be given its ordinary grammatical meaning. There is a provision, namely, section 8 of the Act, dealing with the fixation of rent of furnished premises and the Controller may on application of a tenant made within six months of the beginning of the tenancy, reduce the portion of the rent which according to the Controller, was added in respect of the use of furniture to a fair and reasonable amount, if he finds that such portion of the rent was unduly high. There is, however, no provision dealing with any special reduction where premises are let with services.

That premises can be let with services and still be premises within the meaning of the Act is, I think, clear from the provisions of a number of sections of the Act. Section 34 provides:

"Whoever in any case in which an order or decree for the recovery of possession of any premises is prohibited under section 12 without the previous written consent of the Controller, or save for the purpose of effecting repairs or complying with any Municipal requisition, wilfully disturbs any easement annexed to such premises or removes, destroys or renders unserviceable, anything provided for permanent use therewith, or discontinues any supply or service comprised in the tenancy of such premises, shall, on the complaint of the party aggrieved, be liable on the first occasion, to a fine which may extend to five hundred rupees."

From this section it is quite clear that the draftsman of the Act envisaged tenancies which carried with them, as it were, certain services just as a tenancy might carry with it a right to use a way or a right to enjoy light and air and such like which are all easements.

Section 38 also makes it clear that an agreement of tenancy may comprise certain services. Sub-section (1) provides—

“The Controller shall, on application made to him in this behalf by any tenant in possession of any premises, cause a notice to be served in the prescribed manner on the landlord thereof requiring him to make any repairs which such landlord is bound to make to the premises or to take any measures for the due maintenance of the supply of water or electricity, the maintenance of conservancy or sanitary service and the maintenance of any lift, which such landlord is bound to maintain in the premises under the conditions of the tenancy or according to local usage.”

Civil.  
—  
1951.  
Residence Ltd.  
v.  
Surendra Mohan  
Banerjee  
—  
Harries, C.J.

In this sub-section it is again recognized that premises within the meaning of the Act can be let with amenities. Lastly, section 41 also deals with the question of amenities. That section provides:

“(1) No landlord either himself or through any person purporting to act in his behalf shall without just or sufficient cause cut off or withhold any essential supply or service enjoyed by the tenant in respect of the premises let to him.

Explanation—In this section essential supply or service includes supply of water, electricity, lights in the passages and on staircases, lifts and conservancy or sanitary service.”

From these sections I think it is quite clear that the framers of the Act clearly contemplated that a tenancy similar to the one we are considering, namely, a tenancy which carries with it certain amenities was within the purview of the Act.

What was let in this case was a furnished flat and in the tenancy agreement the landlord agreed to provide certain amenities such as electrical light, hot water and such like. He covenanted to provide these amenities just as he covenanted to keep the premises in repair.



CIVIL.  
 ———  
 1951.  
 {  
 Residence Ltd.  
 v.  
 Surendra Mohan  
 Banerjee.  
 ———  
*Harries, C.J.*

Mr. Niren De contended that by reason of the obligations of the landlord to provide these amenities the flat could not be regarded as premises as defined in the Act. If Mr. Niren De is right then the fact that in the tenancy agreement the landlord undertook to execute repairs would place the flat entirely outside the purview of the Rent Control Act. Again, it is common knowledge that in blocks of flats, durwans and night-watchmen are invariably installed by the landlord and frequently the landlord might agree in the tenancy agreement to provide such protection. Would the mere providing of a durwan at the main entrance to a block of flats be sufficient to place each one of the flats in the blocks outside the purview of the Act? That would undoubtedly be the result if Mr. Niren De's argument is right because the so-called rent payable would not strictly be rent for the flat, but a payment partly for the flat and partly for services.

In my judgment when a flat is let, with the landlord agreeing to provide certain free services, what is let is the flat and what is paid is paid for the flat with the landlord providing certain amenities or performing certain obligations. What is paid is rent for the flat and no part of it can be truly regarded as payment for the services. Could it be possibly said that if in a tenancy agreement the landlord had undertaken to execute repairs and to paint the premises once every five years then what was paid monthly for the premises was not rent but that only a part of it was rent and the remainder would have to be apportioned to the cost of repairing and the cost of painting. In ordinary letting where covenants of this kind appear it has never been contended even that what is paid is not strictly rent and it appears to me that it makes no difference that the landlord has undertaken obligations other than the customary ones for the benefit of the tenants. If he has undertaken obligations by the tenancy agreement the monthly payment or the yearly payment as the case may be would be suitably adjusted, that however would not make the monthly or yearly payment any the less rent.

In the sections that I have quoted from the Act the draftsman treated these services or amenities like assessments. A flat, for example, on the upper floor is let and if nothing is said about the right to use the common staircase and the common

passages, the very letting would give such a right. It could never be said that what was paid for the flat was not strictly rent because it included a payment for the use of the common staircase and the common passages. The user of the common staircase and passages is an obligation which the landlord would be bound to provide to the tenant who had taken the flat, and it appears to me that where the landlord has undertaken not to provide a common staircase but a lift, the position would be very much the same. What the tenant would pay for the flat would be rent, but by the tenancy agreement the landlord would be bound to provide a lift for access to the flat. What is paid as rent under an agreement is paid for the premises together with the benefits of the landlord's covenants and that payment is at common law in England and under ordinary tenancy law in India the rent of the premises and must be regarded as the "rent" of the premises as that term is used in the Rent Control Acts.

CIVIL.

1951.

Residence Ltd.

v.

Surendra Mohan  
Banerjee.

Harries, C.J.

I am aware of the danger of referring to English Authorities on Acts such as the present. But two recent cases in England make it clear that the courts there regard rent as what is actually paid under the tenancy agreement for the premises and if under the agreement the landlord has to provide certain amenities, the sum paid is nevertheless rent in the true sense of the term.

The expression "standard rent" in the Calcutta Rent Control Acts means very much what it means in the English Act. In the Rent and Mortgage Interest Restriction Act, 1939, the expression "standard rent" means the rent at which the dwelling house was let on a certain date and that is very much the meaning of the term in India.

In the case of *Property Holding Company Limited v. Clark* (1) the Court of Appeal had to consider what was the standard rent of certain premises. It appears that by an agreement of June, 1934 the premises had been let for the payment of £110 a year as rent and an additional payment of £30 a year in respect of the provision of certain lighting and cooking equipments, the furnishing and cleaning of the hall and staircase and other similar amenities.

(1) [1948] 1 K.B. 630.

CIVIL.

1951.

Residence Ltd.

v.

Surenendra Mohan  
Banerjee.

Harries, C.J.

It was contended that such being the agreement the rent was £110 a year and did not include the £30 a year which was said to be paid for these amenities or services. The Court of Appeal, however, held that the additional payment of £30 a year under the agreement of 1934 was part of the rent within the meaning of section 2, sub-section 3 of the Act which as I have said defines "standard rent."

In a somewhat later case *Alliance Property Company Ltd. v. Shaffer* (1), which was later affirmed by the Court of Appeal (2). Slade J. went somewhat further. In that case the premises had been let on May 31, 1934 for £175 per annum. Later on the same day the tenants had executed a second deed under which they covenanted to pay a further £100 per annum to the landlords of which £40 was in consideration of certain alterations which the landlords had made to premises and £60 was payable towards the cost of management of the building. This second deed was described on the back thereof as a supplemental agreement, and it was provided that it was to run concurrently with the lease. In these circumstances Slade J. following the decision of the Court of Appeal to which I have made reference [*Property Holding Co. Ltd. v. Clark* (3)] held that the standard rent of the premises was not £175 as contended by the tenants, but £275 as contended by the landlords. In other words, the rent included not only what was described as rent in the tenancy agreement proper, but also those payments which were contemplated in the supplemental agreement which were really payments for amenities provided by the landlords under their agreement with the tenants.

It appears to me that the decision of Bose J. that the rent of these premises was Rs. 190/- p.m. cannot possibly be assailed. That was the rent payable for the premises and it is not the less rent proper because the landlord in the tenancy agreement had undertaken to do certain acts.

That being so the application before Bose J. was rightly dismissed and the appeal, therefore, fails and is dismissed with costs.

(1) [1948] 2 K.B. 464.

(2) [1949] 1 K. B. 367.

(3) [1948] 1 K.B. 630.

Certified for two Counsel. One set of costs will be paid to the two Rent Controllers who have appeared through one counsel.

CIVIL.

1951.

The order of stay of proceedings before the Rent Controller is vacated. The Registrar will intimate to the Rent Controller, at the cost of the tenant, respondent W. C. Reid, that the stay order has been vacated and that he may proceed. The Rent Controller will act on the endorsement of Mr. A. K. Sen.

Residence Ltd.

v.

Surendra Mohan  
Banerjee.

Harries, C.J.

*Messrs. Mitters and Basu:* Solicitors for the Appellants.

*Mr. Hem Chandra Moitra:* Solicitor for W. C. Reid.

*Mr. N. C. Mitra:* Solicitor for the Rent Controller Respondents.

S.K.R.C.

*Appeal dismissed.*

## ORIGINAL CIVIL.

*Before Mr. Justice P. B. Mukharji.*

CIVIL.

1951.

March, 20.

KANCHANMALA DASSI

v.

LILABATI DEBI.\*

*West Bengal Premises Rent Control Act, 1948—Sections 11(1)(c) 11(1) (c)—Using or allowing to be used for immoral purposes—What is—If “immoral” in sub-clause (c) is limited by ideas and notions as expounded and defined in Bengal Suppression of Immoral Traffic Act—Annoyance—What is—Nuisance.*

The word ‘immoral’ in sub-section (c) of section 11(1) of the West Bengal Premises Rent Control Act, 1948 is not limited by the ideas and notions of brothel as expounded and defined in the Bengal Suppression of Immoral Traffic Act. That Act defines a brothel for the purposes of that Act and provides certain penalties and consequences; but there may be a brothel apart from the Bengal Suppression of Immoral Traffic Act and the question under the Rent Act is to be determined independently of any provisions of the Bengal Suppression of Immoral Traffic Act.

Prostitution and living as only one man's mistress differ only in degree but stand on the same plane; the latter is sufficiently immoral to come within the meaning of the Rent-Control Act.

*Upfill v. Wright (1) relied on.*

‘Annoyance’ is a wider term than ‘nuisance’ and if it is found that a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person but of the ordinary sensible inhabitant of a house, which disturbs his reasonable peace of mind, that is an annoyance although it may not appear to amount to physical detriment to comfort.

*Tod-Heatley v. Benham (2) relied on.*

Common prostitution as explained in *Rex v. Munch* (3) cited.

Suit for recovery of premises No. 8, Latu Mullick Lane.

The material facts will appear from the judgment.

\* Original Civil Suit No. 2871 of 1949.

(1) [1911] 1 K.B. 506 (510, 512-13).

(2) (1888) 40 Ch. D. 80.

(3) [1918] 1 K.B. 635 (637).

*Mr. Binayah Banerjee* for the Plaintiff.

*Mr. Rabi Ray* for the Defendant.

The judgment of the Court was as follows:—

**P. B. Mukharji, J.**—This is a suit for the recovery of premises No. 8, Latu Mullick Lane, Calcutta. The ground on which the ejectment is asked is, first, that the defendant has been using or showing the premises to be used as brothel and thereby has been guilty of conduct which is a nuisance or annoyance to the occupiers of the neighbouring premises, and secondly, service of notice dated the 9th of July, 1949 by the Commissioner of Police, Calcutta under the Bengal Suppression of Immoral Traffic Act. The notice to quit is pleaded as having been served on the defendant and is dated the 13th July, 1949, asking the defendant to vacate on the expiry of July, 1949. The written statement of the defendant denies that the premises are being used as brothel or that it is a nuisance or annoyance to occupiers of the adjoining or neighbouring premises. There is also denial of the service of notice by the Commissioner of Police.

Mr. Banerjee appeared for the plaintiff and Mr. Rabi Roy for the defendant. On behalf of the defendant, the following issues were raised:—

1. Has the defendant been using or allowing the premises to be used as a brothel as alleged in paragraph 2 of the amended plaint?
2. Has the defendant been guilty of conduct which is a nuisance or annoyance to the occupiers of adjoining or neighbouring premises?
3. Has the defendant been served with the Police notice dated 9th July, 1949?
4. Is the notice to quit dated the 13th July, 1949 valid in law and binding on the defendant?
5. To what relief or reliefs, if any, is the plaintiff entitled?

CIVIL.

1951.

Kanchanmala  
Dassi

v.

Lilabati Debi

March, 20

CIVIL.

Mr. Banerjee appearing for the plaintiff has accepted these issues.

1951.

Kanchanmala  
Dassi  
v.  
Lilabati Debi.

A large number of witnesses have been examined in this case and there is also an admitted brief of documents marked Ex. A in these proceedings.

Mukharji, J.

Issues 1 & 2:

I have no hesitation in coming to the conclusion that the premises have been and are being used by the defendant as a brothel. Apart from the evidence of witnesses called on behalf of the plaintiff, it appears to me to be admitted even by the defendant's witnesses, Kanai Lal Das, Aswini Kumar Das and Govinda Charan Laha. In answer to questions 23 & 24, Kanai Lal Das, a carpenter living at No. 15, Kailas Kaviraj Lane, behind the premises in suit, says that the inmates of 8, Latu Mullick Lane, are prostitutes and they live like permanently kept mistresses, but he said that they created no disturbance or noise. By the manner and behaviour of their living, the inmates made it quite clear to him that the inmates were prostitutes. Witness Aswini Kumar Dutt who is a resident of 10, Latu Mullick Lane, says that the premises are inhabited by women only who are visited by male visitors at night but not during the day. That is in answer to this Court in Q. 79. Again, in answer to Q. 26, he says that it is a brothel. The other witness Govinda Charan Laha lives at No. 10, Latu Mullick Lane, and in fact one of the landlords of the last witness Aswini Kumar Dutt tried to say that the people at 8, Latu Mullick Lane, lived like other "domestic" people, but the men and women there although living together are not in lawful wedlock; yet this is the gentleman whose brother petitioned to the Deputy Commissioner of Police which is Ex. D in this suit, making the complaint that premises 8, Latu Mullick Lane, along with other adjoining premises were being used as a brothel and his brother Gour Charan Laha is the very first signatory to Ex. D dated 30th June, 1948. Ex. D complained of the houses being used as a brothel, frequented by notorious characters and that the annoyance was increasing. The petition also referred to an earlier petition dated the 22nd March, 1948. The evidence of this witness Govinda Charan Laha also makes it quite clear that

this complaint related to two or three houses including No. 8 as will be apparent from his answers to Qs. 30-33.

The next consideration is whether this brothel causes a nuisance or annoyance to the occupiers of adjoining premises or to the neighbours. This is really the second issue in the suit. On behalf of the plaintiff the witnesses are unanimous that the presence of this brothel causes a good deal of nuisance and annoyance to the adjoining neighbours or to the occupiers of adjoining or neighbouring premises. Dasarathi Dhar is the son of the plaintiff and collects rents from the tenant. When the premises were first let out in October 1940, he did not know that it was going to be used for a brothel. In fact, his evidence is that a certain gentleman called on him and negotiated to take the house on rent, but he could not remember the name of that gentleman. But that gentleman obtained a receipt in the name of the defendant Lilabati Debi. Dasarathi did not meet defendant at the time when the tenancy was granted and it was when he went to the house next month to collect the rent that he first met the defendant. His evidence is that Lilabati was occupying one room and the other rooms in the house were being occupied by different women and he used to go to the room of Lilabati which is in the first floor for collection of rents. He saw other women occupying several rooms while on visits to Lilabati for collection of rents. Three or four months after the house was let out, people complained to him. He saw men and women in the room going about, smoking in the corridor and heard drunken brawls and other kinds of disturbances. He personally kept watch on 5 or 7 occasions and gave this evidence from his personal knowledge. Kamal Krishna Ghosh was a witness from the Brothel Section of the Detective Department of the Calcutta Police who produced the Police records to show that premises No. 8, Latu Mullick Lane, is a declared brothel. It was so declared on the 17th July, 1945. He also spoke of an enquiry made by the Police regarding these premises. The person who enquired, himself came to give evidence and is Basanta Kumar Chatterjee, a Sub-Inspector of Police, now attached to the Enforcement Branch and in 1948 he was the Sub-Inspector attached to the Jorasanko Police Station within which is situated the house in suit. His evidence is that this house is a brothel and sometimes in the night women with their

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi

Mukharji, J



CIVIL.  
 ———  
 1951.  
 ~~~~~  
 Kanchanmala
 Dassi
 v.
 Lilabati Debi.
 ———
 Mukharji, J.

paramours create disturbance under the influence of liquor and he saw this himself. This enquiry he made after the petition to the Police dated the 30th June, 1948, and after enquiry he made the report on the 14th August, 1948. Witness Jaydeb Addy on behalf of the plaintiff supported the same case. He is a resident of 15A, Latu Mullick Lane, which is in front of the premises in suit. His evidence is that prostitutes live in that house and he has himself noticed these prostitutes standing on the streets, exhibiting themselves and he heard knocking at the door at 2 o'clock at night or in the early morning and noticed pimps coming along with some other men and entering the house in suit. He has actually seen the prostitutes soliciting custom openly. He is a businessman in piecegoods trade and lives with his family at the adjoining premises. In answer to Qs. 29 and 30 he definitely says that the existence of that house in the locality makes it extremely inconvenient for respectable citizens to live in the neighbourhood where there are shouts, noises and rows created by the pimps, the goondas, the hooligans and other customers who come there. The noise goes on sometimes till midnight and sometimes till the early hours of the morning, according to his evidence. He has also complained that it adversely affects the moral standards of the people living nearby. A suggestion was made to him in cross-examination that the noise comes from other adjoining houses which are used also as brothel but he was definite in his answers that the noise and disturbance also came from the house in suit.

Then followed Sisir Kumar Sil, another witness on behalf of the plaintiff. He is an assistant in the office of Commercial Intelligence and Statistics under the Government of India, living at 12A, Latu Mullick Lane. The premises in suit and his residential house are very close with one house intervening. He also has pledged his oath that the house at 8, Latu Mullick Lane, is occupied by prostitutes, that the inmates of 8, Latu Mullick Lane, behave as prostitutes, create disturbance in the middle of the night in a drunken state, visited by men at all hours and so much so that sometimes the door of his house is knocked at by mistake by people wanting to go to the prostitutes. He impressed me as a highly respectable citizen and I have no hesitation in accepting his testimony as truthful.

Other neighbours like Shyama Charan Nandy from 12A,

Latu Mullick Lane and Tinkari Dhar from 12B, Latu Mullick Lane have given evidence supporting the same case.

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

Mukharji, J.

On this evidence I am satisfied that the house is used as a brothel and that the defendant is guilty of conduct which is a nuisance or annoyance to the occupiers of adjoining or neighbouring premises. I am not prepared to accept as against this evidence the testimony of Kanailal Das, Aswini Kumar Dutt and Govinda Charan Laha who have tried to say that this is a very peaceful brothel having only teetotallers and individuals who neither smoke nor drink and upholding the new morality where men and women live together without being married. Aswini Kumar Dutt says that he knows Lilabati, the defendant. The reason for his saying that this is not a noisy brothel is that women are old and advanced in years in this house, but he is also the man who says that he knows the plaintiff's witnesses Tinkari Dhar, Shyama Charan Nandy and Sisir Kumar Sil whom he admitted to be all respectable people. If that is so, I do not see why these respectable people, whose evidence I have just discussed, will come here to give false evidence. He appears to me as an overzealous witness who, in answers to Qs. 47-50, was prepared to say that the visitors to these women came peacefully without making any noise and that they never drank and that the women never solicited on the threshold or outside the door of 8, Latu Mullick Lane. This is the witness who, as I have said, knew the defendant Lilabati and when the Court asked him how he came to know her, his answer was that she asked him to give evidence in this case and that was how he got to know her. Then he qualified the answer by saying that he knew her from before but when he was asked whether he spoke to her before, his answer was in the negative. I cannot imagine how this gentleman if unknown to the defendant could be picked up by the defendant as being a witness who was likely to speak for her. Similarly, the evidence of Govinda Charan Laha that this was a peaceful brothel, cannot be accepted, in my opinion, and as I have already indicated, his own brother, Gour Laha, complained to the Police on this ground and his brother lives in the very same house. The other witness Kanailal Das was palpably evasive and shaky when he was asked about his acquaintance with Lilabati and it finally transpired that there was a conversation from the housetop between Lilabati and his wife

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

Mukharji, J.

and that was how he came to give evidence here. I am not prepared to accept the credit of testimony of these witnesses as against the credit of the testimony of the plaintiff's witnesses for reasons which I have indicated above.

The only point made by learned counsel for the defendant is that Latu Mullick Lane is more or less a brothel quarter in the sense that there are two other houses which are brothels and that Rambagan area is close by, which is also a brothel area, and therefore these citizens are not entitled to object to this house being used as a brothel. I do not accept that argument, first, on the point of fact and, secondly, on the point of law. As regards the fact, it is quite true that there are two other houses in this lane which are brothels and which may or may not create a nuisance. A brothel may or may not create nuisance but if it does cause nuisance it is certainly objectionable in law. The fact is that, in this particular case, respectable people of the locality did complain to the Police repeatedly and have come here before me to complain that it is a nuisance with drunken brawls, pimps, shouts, disturbances, people under the influence of liquor coming at all odd hours during the night and going away in the early hours of the morning. That, to my mind, is a state of affairs which is not only a nuisance to the people who live in that locality but also a cause of annoyance to the occupiers of adjoining or neighbouring premises sufficient enough to exclude the defendant from the benefit of the Rent Control Act. In my judgment it is a clear case of nuisance in fact and in law.

It has been argued before me that under the Rent Control Act, the tenant himself or herself has to be guilty. Now, the relevant section is section 11(1) (c) and 11(1) (e) of the Rent Control Act of 1948. The first provision is that, where the tenant has been using the premises or allowing the premises to be used for immoral or illegal purposes, such a tenant cannot obtain the protection granted by section 11 of the Rent Act. In this case, on the facts that I have shown, I have no hesitation in holding that the defendant as tenant had been using the premises or allowing the premises to be used for immoral purposes. The next provision is that, where the tenant has been guilty of conduct which is a nuisance or annoyance to occupiers of adjoining or neighbouring premises, such a tenant also cannot

ask for the protection of section 11 of the Rent Act of 1948. Here, again, on the facts as I have found, the defendant took this house on rent and has been using it as a brothel and that user is the cause of nuisance and annoyance to the occupiers of adjoining or neighbouring premises. I fail to see in this context how she could ask for protection of the Rent Act of 1948.

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

Mukharji, J.

It has been argued before me that the disturbances and shouts of those who come to visit 8, Latu Mullick Lane, are not enough to be a nuisance within the meaning of this particular sub-section (e) of the Rent Act of 1948 because it is not the shouts or the disturbances of the tenant herself. I am not disposed to accept this argument. The Statute says that the tenant should be guilty of a conduct which is nuisance or annoyance. I hold in this case that the tenant's conduct of running a brothel and inviting in that sense people to visit that house is a conduct which is the proximate cause of annoyance or nuisance.

It has also been argued that keeping a brothel must be within the meaning of the Bengal Suppression of Immoral Traffic Act; otherwise it is not immoral. I have come to the conclusion that this argument has no substance at all. The Bengal Suppression of Immoral Traffic Act defines a brothel for the purposes of that Act and provides certain penalties and consequences. But there may be a brothel apart from the Bengal Suppression of Immoral Traffic Act. The question which I have to decide is under sub-section (c) and section 11(1) of the Rent Act. Is the tenant using or allowing the premises to be used for immoral purposes? On the facts as I have found and stated above, I have no hesitation in holding that the premises are being used by the tenant and also allowed by the tenant to be used for immoral purposes, independently of any provisions of the Bengal Suppression of Immoral Traffic Act. I do not consider that the word 'immoral' in sub-section (c) of 11(1) of the Rent Act of 1948 is limited by the ideas and notions of brothel as expounded and defined in the Bengal Suppression of Immoral Traffic Act.

Before I conclude, I should like to notice the arguments and the authorities which have been cited before me in this

CIVIL. connection. In the case of *Upfill v. Wright* (1), Darling J., observes as follows:—

—
1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

—
Mukharji, J.

“Applying the law so laid down to the present case, one has to see whether the flat was let either for an illegal or for an immoral purpose, for if so, the rent cannot be recovered. The flat was let to the defendant for the purpose of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there. I do not think that it makes any difference whether the defendant is a common prostitute or whether she is merely the mistress of one man if the house is let to her for the purpose of committing the sin of fornication.”

Then again at pp. 512-13 of the same report, the other learned Judge Bucknill J. observes:

“It was urged that prostitution is one thing and living as one man’s mistress is quite a different thing. They may differ in degree but they both stand upon the same plane.”

The argument that is advanced on the basis of the evidence of the defendant and on the basis of the petition of defendant and others dated the 23rd November, 1948 (Defendant’s document 4) appearing in the admitted brief of documents that no prostitution is permitted in the house and the occupants live there as husband and wife although not married is met by this authority. I accept the test of Bucknill J. that prostitution and living as only one man’s mistress differ only in degree but stand on the same plane. In my judgment the latter is sufficiently immoral to come within the meaning of the Rent Control Act as I construe it so as to exclude such persons from obtaining the benefit and protection of the Rent Act. There, of course, in the case before Darling J., the plaintiff’s action failed because the landlord knew from the beginning that he was letting out the house for immoral or illegal purpose and, therefore, the Court did not lend its aid to recover such house or rent. But the fact here is entirely different and it has not even been suggested that the plaintiff in this case knowingly let out the house to a brothel-keeper.

(1) [1911] 1 K.B. 506 (510).

The word 'annoyance' has also been subject of judicial interpretation and its importance in this suit arises from the fact that it is used in sub-section (e) of section 11 of the Rent Act 1948. The well-known decision of the Court of Appeal in *Tod-Heatley v. Benham* (1) is on the point. Bowen L. J. at p. 97 observes:—

"What is the meaning of the term 'annoyance'? It implies more, as it seems to me, than 'nuisance', ... If annoyance meant the same thing as 'nuisance', it would not have been put in. It means something different from nuisance 'Annoyance' is a wider term than nuisance, and if you find a thing which reasonably troubles the mind and pleasure, not of a fanciful person or of a skilled person but of the ordinary sensible English inhabitant of a house—if you find there is anything which disturbs his reasonable peace of mind, that seems to me to be an annoyance, although it may not appear to amount to physical detriment to comfort."

Applying that test and substituting an Indian for the English inhabitant and which would still then in my opinion be good law, I find certainly on the facts and evidence of this case that the test of annoyance has been satisfied.

On what is prostitution and what is immoral, I have heard very interesting arguments. Mr. Rabi Roy appearing for the defendant has argued that association of men and women outside the legal marriage is not immoral at all. I am disposed to accept that view generally and I would have been sorry were I to hold that all association between men and women outside legal marriage was immoral. I do not however need to embark on any advanced theory of morality or the doctrine of free love untrammelled by marriage. It is enough for me on the facts of this case to find that it is no mere association here such as Mr. Roy was contemplating, but it had the awful result in fact of open solicitation for custom, drunkenness, brawl, pimps, noise, shouts and disturbances. Equally interesting have been the arguments addressed to me on the story of prostitution. Mr. Roy has relied on the decision of *Jatindra v. Manindra* (2), as to

(1) (1888) 44 Ch. D. 80.

(2) (1949) 54 C.W.N. 384.

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

Mukharji, J.

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

Mukharji, J.

what is open prostitution and what is clandestine prostitution. I do not think it is relevant for me to decide this particular point that is raised in the argument. That case related to a case of public nuisance and where the fact was one of clandestine prostitution. Darling J. in *Rex v. Munch* (1) makes some relevant observation explaining and defining prostitution. Those observations made in interpreting the words "common prostitute that occurred in section 2(2) of the English Criminal Law Amendment Act of 1885 are:—

"We have to decide what is a prostitute or what is prostitution. The argument advanced on behalf of the appellant practically was that the offering by a woman of her body for the gratification of the sexual passions of men, even if it is done as a regular trade, indiscriminately and for gain, is not prostitution, unless the men's passions are gratified by the act of sexual connection and not otherwise. We have come to the conclusion that that contention is not well-founded The Court is of opinion that the term 'common prostitute' in the statute is not limited so as to mean only one who permits of lewdness with all and sundry, or with such as hire her, when such acts are in the nature of ordinary sexual connection. We are of opinion that prostitution is proved if it be shown that a woman offers her body commonly for lewdness for payment in return."

I do not propose to make any attempt to define prostitution because it is enough for me to find immorality which I have done in this case.

Mr. Roy has argued that this Court is not a Court of morals but a court of law and that I am free to hold that prostitution and keeping of brothel such as are found on the evidence in this case are not immoral, but quite moral according to the standards of progressive society which he has advocated. He has further argued that immorality must be such that it must interfere with the legal rights of an individual or otherwise there is no immorality cognisable by the Court of law. I am unable to accept either

(1) [1918] 1 K.B. 635 (637).

of his contentions without qualifications. No doubt it is true that this Court is not a court of morals but because it is a court of law and because the law or the statute requires this court to come to a finding as to whether a house is being used for immoral purpose or not, this court alone can finally decide whether in the facts of a particular case the purpose is moral or immoral. In deciding the question whether the purpose is moral or immoral, this Court does not act as a court of morals, but acts as the court of law deciding the question. It is not either the private morality of the Judge deciding it or the fanciful morality of persons who happen to be propounding the new sociology or advanced philosophy of morals that can be allowed to operate as the test of morality but in deciding this issue, the Court has to adopt and go by the ordinary normal standards of morality prevailing and accepted in the society. Immoral purpose under the Rent Control Act must be understood by the standards in the society where the question arises. Such as are facts that have been proved in evidence, in my view, leave no room for doubt that the purpose is immoral in this case.

CIVIL.
—
1951.
—
Kanchanmala
Dassi
v.
Lilabati Debi
—
Mukharji, J

In these circumstances I hold that the defendant has been using or allowing the premises to be used as a brothel and for immoral purposes and is also guilty of conduct which is a nuisance or annoyance to the occupiers of adjoining or neighbouring premises. In that view of the matter, I answer both the first and the second issues in the affirmative.

Issue No. 3:

On this issue the plaintiff cannot succeed. I do not think there has been any service of the notice of the Commissioner of Police dated the 9th July 1949 on the defendant. Mr. Banerjee gave up this point after the evidence of the Sub-Inspector of Police and of the keeper of Police records. I do not therefore need to elaborate this point. It is enough for me to say that there was no enquiry after the 8th December 1948. The enquiry was on the 26th October 1948. The reason why I mention this date, 8th December 1948, is that the order of permission of the Deputy Commissioner of Police, Detective Department bears the same date, 8th December 1948. That order runs in these terms and is addressed to the defendant and others:—

CIVIL.

1951.

Kanchanmala

Dassi

v.

Lilabati Debi.

Mukharji, J.

"There is no objection to their staying at the above premises provided they have decent life and do not disobey the orders served on them."

That being so, this notice of 9th July, 1949 could no longer be of any importance or relevance.

I, therefore, answer this issue in the negative.

Issue No. 4:

The learned counsel for the defendant has not seriously questioned the validity of notice to quit dated 13th July 1949. Service of the notice is admitted but it was argued that the notice urged the grounds which have not been maintained on the evidence. I find on facts that it has been maintained in evidence by the plaintiff and her witnesses. Besides, I do not think, that a notice to quit requires to state any ground at all.

I therefore answer this issue in the affirmative and hold that the notice dated the 13th July, 1949 is valid.

Issue No. 5:

In the circumstances, it follows that the defendant is not entitled to any protection under the Rent Control Act, 1948 by reason of the findings under issues 1 and 2.

There will, therefore, be a decree for ejectment and mesne profits at the rate of rent from 1st August, 1949 until delivery of possession. The plaintiff is entitled to the costs of this suit.

S.D.G.

Suit decreed,

APPEAL FROM ORIGINAL CIVIL.

*Before the Hon'ble Sir Arthur Trevor Harries, Kt., Chief
Justice and Hon'ble Mr. Justice S. N. Banerjee.*

MOHAMMAD IBRAHIM

v.

BENI MADHAB MULLICK & OTHERS.*

CIVIL.

1951.

*West Bengal Premises Rent Control Act of 1948—(Act XXXVIII of 1948)—
Section 11(x) (b)—what is unlawful subletting under the Act—surrender
of a lease whether affects sub-lease—Section 115 of the Transfer of
Property Act (Act IV of 1882).*

If a lessee accepts a new contract of tenancy, it operates as a surrender of the old tenancy. For a new lease cannot be granted unless the old one is surrendered. Such a surrender takes place by operation of law and the intention of the parties is immaterial.

Section 115 of the Transfer of Property Act provides that a surrender, express or implied, of a lease does not prejudice an under lease of the property. The Section proceeds on the principle that a man is not permitted to derogate from his own grant.

A lessee who has assigned his interest by way of mortgage or otherwise cannot defeat the assignee's right by a surrender to the lessor. In the same way a surrender by the lessee cannot prejudice the under lessee. Such a surrender operates as an assignment to the lessor of the lessee's interest and thus brings the under lessee into immediate relation with the lessor.

Sub-tenancy is an interest carved out of the interest of the tenant. If a surrender does not prejudice the rights of the sub-tenants, it implies that these rights existed before the surrender. A right which exists at any point of time is not "created" at that point of time thereafter.

Where three tenants surrender their tenancy in order to obtain a fresh tenancy in favour of two of them, the new tenancy is created subject to the sub-tenancies existing before the surrender. The new tenants by continuing to collect rent from the previous sub-tenants cannot be regarded as having unlawfully sub-let the premises within the meaning of the West Bengal Premises Rent Control Act of 1948. The new tenants cannot, therefore, be ejected on this ground.

* Appeal from Original Decree No. 120 of 1950 against the decree passed by Mr. Justice P. B. Mukharji dated 10th July, 1950.

CIVIL. Appeal by the Defendant.

1951. Suit for possession.

Mohammad
Ibrahim

The material facts will appear from the judgment:

v.

Beni Madhab
Mullick

Messrs. A. K. Sen with S. Roy for the appellant.

Messrs. Niren De with Gauri Mitter for the respondent.

S. N. Banerjee, J.:—This is an appeal by the defendants from a judgment of P. B. Mukharji, J. which was passed on 10th July, 1950, decreeing the landlords' suit for possession.

The point involved in the appeal is a short one, namely, whether the defendants come within the mischief of section 11(1) (b) of the Rent Control Act of 1948 (hereinafter for the sake of convenience referred to as unlawful subletting). It is admitted on behalf of the parties by their counsels that the Act of 1948 governs the rights of the parties in this case.

That section (inter alia) provides that a tenant is deprived of the protection of the Act where he has sublet or otherwise transferred his interests in, the premises for more than six consecutive months and to the extent either of the whole or a major portion of the premises, in the absence of any contract or other authority in writing expressly permitting such subletting or transfer.

The facts of the case are as follows:

The plaintiffs (landlords) are owners (being the trustees) of premises No. 3 Bolai Dutt Street in the town of Calcutta, which is a partly three storied and partly four storied house.

The premises were let to Mohammad Siddique & Sons by a lease which expired on 11th June, 1934. During the subsistence of this lease, there were sub-tenants in the premises. Their interest, of course, fell on the expiry of the lease.

The landlords by a lease dated 12th June, 1934, let the premises to three persons Nawabuddin, Mehrajuddin and

Mohammed Ibrahim, who carried on a partnership business under the name and style of Messrs. Mahammad Ibrahim Mehrajuddin.

CIVIL.

1951.

Mohammad
Ibrahim

v.

Beni Madhab
Mullick

Banerjee, J.

Mohammad Siddiq & Sons on the expiry of the lease refused to vacate the premises. The new tenants filed a suit for ejectment against Siddique & Sons and obtained a decree in this Court. This decree, no doubt, could be executed not only against Siddique & Sons but also against the subtenants. But it appears that the decree was not put into execution and the tenants under the lease of 1934 came into occupation of the two rooms which were in possession of Siddique and Sons and allowed the subtenants to continue. Siddique and Sons left the premises.

The lease of 1934 was for a period of three years but gave to the lessees option to renew it for another two years. The lessees exercised the option and the term of the lease was extended. After expiry of the term, the lessees held on.

Sometime towards the end of 1942, Nawabuddin retired from the partnership and on 6th January, 1943, defendants Ibrahim and Mehrajuddin wrote to the landlords informing them that Nawabuddin had retired from the partnership and asked the landlords to issue rent bills in the name of the two persons, Mehrajuddin and Ibrahim, which previous thereto were issued in the names of the three lessees. The landlords agreed to the proposal and the rent was thereafter accepted from, and rent bills issued in the names of the two tenants. The effect of this was the surrender of the tenancy existing previous thereto and the creation of a new tenancy. For before the landlords had agreed to accept Mehrajuddin and Ibrahim as tenants, Nawabuddin was also liable to perform the obligations of the contract of tenancy. By consent of all the parties concerned he was released from the obligations and the two remaining partners took upon themselves the burden of performing the obligations of the contract of tenancy. This operated as implied surrender.

Sub-tenants, of course, continued in the premises and it is not disputed that except as to five, the sub-tenants were sub-

CIVIL

1951.

Mohammad

Ibrahim

v.

Beni Madhab

Mullick

Banerjee, J.

tenants of the premises from the time of Siddique & Sons and that a major portion of the premises has been in their occupation. There are thirty five rooms in the premises and except two rooms (namely, the godowns which are in possession of the defendants), the rest have been and are in occupation of sub-tenants.

The lease dated 12th June, 1934, prohibited subletting of the 'demised premises entirely' without the written permission of the landlords. In this case the entire premises have not been sublet. Portions of them only have been sublet. The lessee under section 108 of the Transfer of Property Act may transfer by way of sublease the whole or any part of his interest in the premises, in the absence of a contract or any local usage to the contrary. In this case the lease did not prohibit subletting of a portion of the premises nor is there any local usage to the contrary. Therefore the subletting was perfectly lawful when it was made.

On 30th April 1945, there was a fresh contract of tenancy between the landlords and the defendants, which is quite different in its scope and character from the lease of 1934. There is no doubt that this again operated as surrender of the previous tenancy. If a lessee accepts a new contract of tenancy, it operates as a surrender of the old tenancy, for a new lease cannot be granted unless the old is surrendered. *Crowley v. Vitty* (1). Such a surrender takes place by operation of law and the intention of the parties is immaterial.

The learned judge on the facts recited above took the view that there had been an 'unlawful subletting' by the defendants, and gave a decree for possession to the landlords. This appeal is against that decree.

There is no doubt in my mind that in 1934 Nawabuddin Mehrajuddin and Ibrahim sublet the premises to the sub-tenants after their interest had determined, by allowing them to continue and accepting rent from them and treating them as their tenants, and this they could do under the law then existing. So the subletting was lawful.

(1) (1852) 7 Exch. 319.

In 1943, as I have said, there was an implied surrender of the previous tenancy and again in 1945 by the contract of tenancy of that year there was surrender of the tenancy existing previous thereto.

Section 115 of the Transfer of Property Act provides that a surrender, express or implied, of a lease does not prejudice an underlease of the property. The section proceeds on the principle that a man is not permitted to derogate from his own grant. As between the parties to the transaction a surrender by the lessee puts an end to his interest, but it does not affect third persons who have acquired an interest from him. A lessee who has assigned his interest by way of mortgage or otherwise cannot defeat his assignee's right by a surrender to the lessor and in the same way a surrender by the lessee cannot prejudice the under-lessee. Such a surrender operates as an assignment to the lessor of the lessee's interest and thus brings the under-lessee into immediate relations with the lessor. This is a well established principle of law which is clearly stated in books of authorities like Woodfall, Foa and Redman.

Therefore, the rights created by the subletting of 1934 in favour of the subtenants could not be affected by the surrender of 1943 or 1945. The defendants could not determine the interest of the subtenants by surrendering their term to the landlords because from the date of the underlease they had parted with their own interest in the land to the extent of the interest created by the subtenancy.

Sub-tenancy is an interest carved out of the interest of the tenant. If surrender does not prejudice the rights of subtenants, it implies that these rights existed before the surrender and rights which exist at any point of time are not 'created' at that point of time.

In this view there was no subletting by the defendants in 1943 or 1945 or at any time thereafter. If there was no subletting, there could not be an unlawful subletting, that is to say, a subletting within the mischief of section 11(1) (b).

Further in 1934 when the lessees of the lease of that year sublet the premises, the subletting was perfectly lawful. How

CIVIL.

1951.

Mohammad
Ibrahim

v.

Beni Madhab
Mullick

Banerjee, J.

CIVIL.

1951.

Mohammad

Ibrahim

v.

Beni Madhab

Mullick

Banerjee, J.

the Act of 1948 could make it an unlawful subletting is very difficult to see.

Then again in this case it is admitted that at all material times the landlords had knowledge of the subtenancy and of the sub-tenants' rights and with that knowledge accepted rent from their immediate tenants and twice accepted surrender of their tenancies, once in 1943 and other in 1945.

In these circumstances, I do not think the landlords can call the subletting of 1934 as 'unlawful subletting' and use that as a ground for the eviction of the defendants.

Another question of importance arises in this case which however, does not fall to be considered in this appeal, namely, whether a subletting previous to the commencement of the Act of 1948 could be an unlawful subletting within the meaning of the Act. There are a number of decisions of this court noticed in *Gangamoyee v. Manindra Chandra* (1), which have taken the view that on a construction of section 11 of the West Bengal Premises Rent Control (Temporary provisions) Act, 1948, any period of subletting prior to and continuing on or after the 1st December 1948, deprives tenants of any protection under section 11(1) (b) of the Act, if such subletting has been for more than six consecutive months for the whole or a major portion of the premises without a contract in writing expressly permitting such subletting. On this view, the Act of 1948 would to a great extent curtail the rights of the landlords acquired previous to the commencement of the Act of 1948, as a comparison of the relevant provisions of the Rent Control Act of 1934, the Ordinance of 1946 and of the Rent Act of 1948 clearly shows. It is not necessary to burden this judgment by consideration of these provisions of the Acts and the Ordinance.

Whether the 1948 Act can be given a retrospective operation on this point requires fuller consideration and we do not think it fit to say anything as regards the cases which have taken the view that section 11(1) (b) of the 1948 Act has retrospective operation in the sense I have stated. We reserve the consideration of this point in future when the occasion arises. It is not necessary to consider this point in this appeal. It is quite suffi-

(1) 53 C.W.N. 718.

cient for the disposal of this appeal to find, as we have done, that in this case there has been no 'unlawful subletting' that is to say, a subletting within the meaning of section 11(1) (b) of the Act of 1948.

We accordingly allow the appeal, set aside the judgment of the learned trial judge and dismiss the suit with costs here and below. Certified for two counsels.

CIVIL.

1951.

Mohammad
Ibrahim

v.

Beni Madhab

Banerjee, J.

Harries, C.J.:—I agree. The changes which occurred in 1943 and 1945 could not prejudice the rights of the sub-tenants by reason of section 115 of the Transfer of Property Act. The rights of the sub-tenants contained in spite of the surrenders in 1943 and 1945 and as these surrenders were made for the purpose of obtaining new leases the sub-tenants continued in my view as subtenants of the new lessees. It cannot I think be said that the lessees under the new leases of 1943 or 1945 ever sublet to the sub-tenants. The rights of the sub-tenants, after the surrenders in those two years, remained wholly unaffected and their sub-tenancies continued and therefore could not be said to have been created by the new lessees in 1943 and 1945. That being so, the tenants in this case could not be said to have sublet the major portion to the sub-lessees because the subletting to these sub-lessees took place as early as 1934 as pointed out in the judgment delivered by my learned brother.

Akhil Bose & Co., Solicitors for the Appellant.

B. P. Chunder, Solicitor for the Respondent.

S.K.R.C.

Appeal allowed.

APPEAL FROM ORIGINAL CIVIL.

*Before Sir Arthur Trevor Harries, Kt., Chief Justice and
Mr. Justice S. N. Banerjee.*

CIVIL

1951.

March, 1.

THE STATE OF BOMBAY

v.

ADAMJEE HAJEE DAWOOD & CO.*

Indian Arbitration Act (X of 1940) Section 32—Right to bring a suit under section 9 of the Civil Procedure Code (Act V of 1908)—Section 39 of the Specific Relief Act (I of 1877)—Scope of the applications of the Sections 32 and 33 of the Indian Arbitration Act—Whether Arbitration Clause forms an integral part of the contract.

The Arbitration Act does not expressly repeal either Section 9 of the Civil Procedure Code or Section 39 of the Specific Relief Act

An Arbitration Clause, may be written in the same document as the other terms of the contract, but it is not in a sense an integral part of the contract. It is an agreement which is as it were a collateral agreement rolled up in the contract with the other terms of the contract.

It does not follow that a suit asking for a declaration that the "Arbitration" agreement is void is necessarily tantamount to a suit for a declaration that the contract (containing the Arbitration Clause) is void. Similarly a suit challenging the main contract is not necessarily a suit challenging the arbitration agreement which might be annexed to it.

Section 32 of the Arbitration Act does not bar a suit challenging the validity of a contract simply because the contract contains an Arbitration clause. Sections 32 and 33 of the Arbitration Act have a very limited application. They apply only where the existence or validity of an Arbitration Agreement (and not the contract containing the "Arbitration Agreement"), is challenged.

Appeal by the Plaintiff.

Suit for a declaration that a certain contract was not made between the parties and is not binding on it and for other reliefs.

The material facts will appear from the judgment.

* Appeal from Original Decree No. 142 of 1950 against the decree passed by Mr. Justice A. K. Sarkar dated 22-8-50.

Messrs. A. K. Sen and S. Roy for the Appellant.

CIVIL.

Messrs. B. C. Mitra and P. C. Mullick for the Respondent.

1951.

The State of
Bombay

v.

Adamjee Hajec
Dawood & Co

March, 1.

The judgment of the Court was as follows—

S. N. Banerjee, J.:—This is an appeal from a decree made by Sarkar J. on August 22, 1950, dismissing a suit on a preliminary issue. That issue is as to whether the suit is maintainable in view of section 32 of the Arbitration Act, 1940. Section 32 is as follows:

“Notwithstanding any law for the time being in force, no suit shall lie on any ground whatsoever for a decision upon the existence, effect or validity of an arbitration agreement or award, nor shall any arbitration agreement or award be set aside, amended, modified or in any way affected otherwise than as provided in this Act.”

The facts are as follows. The plaintiff, it appears from the plaint, claims a declaration that a certain contract was not made between the parties and is not binding on it. The plaintiff claims a further declaration that the defendant is not entitled to make any claim in respect of the said contract and asks that the contract be adjudged void and delivered up to be cancelled. There is a prayer for an injunction to restrain the defendant, its servants and agents from making any claim, or demand on the contract. There is a prayer also for damages, etc.

By a telegram sent to the plaintiff by one Mr. Kennedy, the defendant offered to supply to the plaintiff certain quantity of gunny bags. This offer was accepted by a letter of the plaintiff to the defendant. There was confirmation of the plaintiff's acceptance.

According to the plaintiff this correspondence constitutes the contract between the parties. It is alleged in the plaint that subsequently it was agreed between the parties that the goods would be shipped free on board the steamer, Calcutta. All the goods except 63 bales were duly delivered. The plaintiff makes no claim in respect of the non-delivery of the 63 bales.

The defendant made a claim against the plaintiff in respect of the 63 bales alleging that Mr. Kennedy was the plaintiff's

CIVIL.

1951.

The State of
Bombay

v.

Adamjee Hajee
Dawood & Co.*Banerjee, J.*

agent and that he had bought the goods for the plaintiff from the defendant through a firm of the name of Moran & Co. It further said that the purchase was made by Moran & Co.'s bought and sold notes referred to as Contract No. 94452. This contract contains an arbitration clause. It is not necessary to set out the other terms of this alleged contract.

It is alleged that the plaintiff having refused to pay, the defendant purporting to act under the arbitration clause—contained in the contract (94452) referred the dispute to the arbitration of the Bengal Chamber of Commerce. The plaintiff objected to the arbitration on the ground that there was no valid submission as the contract was not binding on the plaintiff, the reasons given being (a) that Kennedy had no authority to enter the contract on behalf of the plaintiff, and (b) that the contract was not in terms of the provisions of section 175 of the Government of India Act, which requires that the contract must be signed on behalf of the Government.

The plaintiff on these facts filed the suit, claiming the reliefs I have mentioned above.

Sarkar J. construed the plaint as one for a declaration that the arbitration agreement contained in the contract is invalid and on that view he held in view of sections 32 and 33 of the Arbitration Act that the suit was not maintainable. With great respect to the learned Judge, we are unable to construe the plaint in that way. In the plaint the plaintiff states the circumstances under which, according to it, the alleged contract was entered into and claims a declaration that the contract is not binding on the plaintiff. This is not a suit merely for a declaration that the arbitration agreement is invalid. It is a suit claiming something more, namely, claiming that the contract containing the arbitration clause is void.

Every person has a right to bring a suit which is of a civil nature and the Court has jurisdiction to try all suits of a civil nature (see section 9, Civil Procedure Code). If this right has got to be taken away, that must be taken away by express terms or by necessary implication. The plaintiff has a right to sue for having a contract adjudged void under section 39 of the Specific

Relief Act. Schedule 3 of the Arbitration Act, 1946, sets out the enactments which are expressly repealed. There is no mention there of section 9 of the Code of Civil Procedure, or of section 39 of the Specific Relief Act. Therefore, it is quite clear that the Arbitration Act does not expressly repeal either section 9 of the Code of Civil Procedure or section 39 of the Specific Relief Act. Apart from sections 32 and 33 of the Arbitration Act, there is no section in the Act which can be said to repeal by implication section 9 of the Code of Civil Procedure and section 39 of the Specific Relief Act. Do sections 32 and 33 by necessary implication repeal section 9 of the Civil Procedure Code and section 39 of the Specific Relief Act?

CIVIL.

1951.

The State of
Bombay

v.

Adamjee Hajee
Dawood & Co.

Banerjee, J.

Mr. Bijan Mitter appearing on behalf of the respondent contends that sections 32 and 33 of the Arbitration Act in effect bar all suits in which a declaration is claimed that a contract, which contains an arbitration clause is void. That argument overlooks the nature of an arbitration clause which is contained in a contract. In *Heyman v. Darwins, Ltd.*, (1), Lord Macmillan observes as follows:

"I venture to think that no enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from the other clauses. The other clauses set out the obligations which the parties undertake towards each other *hinc inde*; but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that, if any dispute arises with regard to the obligations which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. Moreover, there is this very material difference that, whereas in any ordinary contract the obligations of the parties to each other cannot in general be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages but its enforcement.

Moreover, there is the further significant difference that the courts in England have a discretionary power of dis-

(1) [1942] 1 All. E.R. 337 (347).

CIVIL.

1951.

The State of
Bombay

v.

Adamjee Hajee
Dawood & Co

Banerjee, J.

pensation as regards arbitration clause which they do not possess as regards the other clauses of contracts.”.

To the same effect are the observations in the speeches of Viscount Simon, Lord Wright and Lord Porter. It is clear from the observations in this case that a contract may come to an end, e.g., by frustration; but the ‘arbitration agreement’ may yet remain operative. The arbitration agreement may be declared void without the contract being declared invalid. They are two separate things.

Whether the arbitration agreement falls with the contract depends upon a particular test and that test is laid down in *De Le Garde v. Workship & Co.* (1). ‘The test is said to be whether the contract is determined by something outside itself, in which case the arbitration clause is determined with it, or by something arising out of the contract, in which case the arbitration clause remains effective and can be enforced.’ (*Russell on Arbitration 14th edition p. 75*).

The arbitration agreement does not come into operation until a dispute arises under or out of the contract. If there is no dispute, there is no operation of the arbitration clause. Therefore, it is quite clear that the arbitration clause, though it is written in the same document as the other terms of the contract, is not in a sense an integral part of the contract. It is as has been said in one of the decisions of our Court, an agreement which is rolled up in a contract with the other terms of the contract. The difference between a contract and an arbitration clause contained in it can also be seen by a consideration of section 34 of the Arbitration Act. Under that section a suit may be stayed or may not be stayed according to the discretion of the Court. In other words, as Lord Macmillan has pointed out the Courts “have a discretionary power of dispensation as regards arbitration clauses which they do not possess as regards the other clauses of contracts.”

It does not follow, therefore, that a suit asking for a declaration that the ‘arbitration’ agreement is void is necessarily tantamount to a suit that the contract (containing the arbitration clause) is void.

(1) [1928] Ch. 17.

The word used in the sections is 'agreement' in the expression 'arbitration agreement,' and not, 'contract.' Yet where necessary the Act uses the word 'contract', e.g., in section 7(1) of the Act,—“where it is provided by a term in a contract In section 7(2) the Act uses the words 'arbitration agreement.' The legislature, though it uses the word 'contract' in section 7, has purposely refrained from using the word 'contract' in section 32 and section 33. Therefore, we have no doubt that the legislature has advisedly used the words 'arbitration agreement' in these sections. I cannot take the view that section 32 contemplates the case of suits challenging the validity of a contract because it contains an arbitration clause. If the intention of the legislature were that all contracts containing an arbitration clause should come within the purview of sections 32 and 33 the legislature would have said so in appropriate words. In my view, sections 32 and 33 have a very limited application, namely, where the existence or validity of an arbitration agreement (and not the contract containing the 'arbitration agreement'), is challenged. Assume for a moment that sections 32 and 33 of the arbitration Act have repealed section 39 of the Specific Relief Act. Which section of the Specific Relief Act will apply in such cases to contracts which do not contain an arbitration clause? We cannot take the view either that section 39 of the Specific Relief Act has been partially repealed, that is to say, repealed so far as it relates to contracts containing an arbitration clause. To hold that section 9 of the Specific Relief Act has been wholly or partially repealed will lead to absurd result.

Sarkar, J. has referred to three cases of this Court: *Manick Lal Memani v. Shiva Jute Bailing Ltd.*, (1), decided by Das J. *Baijnath Narseria v. Chhotulal Sethia* (2), judgment of Clough J., which has taken the view of Das J., *Chaturbhuj Mohanlal v. Bhicam Chand Chororia & Sons* (3), a judgment of Sinha J., in which the learned Judge takes a different view from the other two learned Judges as to the meaning of the word 'existence' in section 32 of the Act. We, in this case, having regard to the view we have taken, are not called upon to express our opinion as to the meaning of the word "existence" in section 32, namely,

(1) (1947-48) 52 C.W.N. 389.

(2) (1947-48) 52 C.W.N. 397.

(3) (1948-49) 53 C.W.N. 410.

CIVIL

1951.

The State of
Bombay.

v.

Adamjee Hajee
Dawood & Co.

Banerjee, J.

CIVIL.
 —
 1951.
 —
 The State of
 Bombay
 v.
 Adamjee Hajee
 Dawood & Co.
 —
Banerjee, J.

whether it means 'factual existence' or 'legal existence.' It may be mentioned here that Mr. Sen, counsel for the appellant, took the point before learned trial Judge; but having regard to the view we have taken in the appeal, he has not thought it fit to put forward any argument on it before us, though he has by no means abandoned it and if the case goes to a higher tribunal he will be at liberty to make use of this point if he is so advised.

Having regard to the view we have taken of the plaint, we are unable to hold that the suit is one for challenging the validity of the arbitration agreement merely.

On these considerations we think the learned Judge's judgment was wrong and the decree must be set aside. The plaint, as we have read it, is a plaint which attacks the entire contract. The suit, therefore, does not come within the purview of section 32 or section 33 of the Arbitration Act.

Mr. Sen has drawn our attention to several Allahabad cases which show that if for the determination of a matter, special jurisdiction is conferred on a Court, then an ordinary civil court is not deprived of its jurisdiction to try the matter because it has got to decide a point which comes within the purview of the special jurisdiction. I do not think that those cases have a direct bearing on the point under consideration. The arbitration Act lays down a definite procedure for challenging the arbitration agreement and on a plain reading of the sections, I am of opinion that section 32 does not hit a suit which challenges the validity of a contract though it contains an arbitration clause.

We allow this appeal and set aside the decree made by the Learned Judge. The suit will go back to the Learned Judge for disposal in accordance with law.

The appellants are entitled to their costs here and in the Court below. Certified for two Counsels.

Harries, C.J.:—I agree. But as we are differing from the Learned Judge I desire to make a few observations.

Section 33 of the Arbitration Act is confined to applications challenging the existence or validity of an arbitration agreement or award. There is nothing in the section which would entitle a Court to hold that a contract was never entered into, or that an alleged contract had no existence or that it was void *ab initio* or had become void. The section is confined to arbitration agreements and awards.

There can be no doubt that no suit would lie by reason of section 32 for a declaration that an arbitration clause did not exist or that it was invalid because the relief claimed in such a suit is the relief expressly mentioned in section 33. Section 33 read with section 32 therefore would bar all suits which fall within the purview of section 33.

Section 9 of the Code of Civil Procedure provides:

“The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognisance is either expressly or impliedly barred.”

It seems to me clear that there is nothing in section 32 or section 33 barring a civil court from taking cognizance of a suit claiming that a contract alleged by the defendant had never been entered into, or claiming that the contract was void *ab initio* or had become void for some reason or another.

It is however contended that such a suit is impliedly barred by section 32 and section 33 of the Arbitration Act because it may be that the ground of attack on the arbitration clause could be used as a ground of attack on the whole contract. The existence or validity of an arbitration clause may or may not be attacked on grounds upon which the whole contract could be attacked. I can imagine a number of cases where the ground of attack on the arbitration clause would offer no ground for attacking the whole contract, whereas in other cases the ground for attacking the arbitration clause might well be a good ground

CIVIL.

1951.

The State of
Bombay.

v.

Adamjee Hajee
Dawood & Co.

Harries, C.J.

CIVIL.

1951.

The State of
Bombay.

v.

Adamjee Hajee
Dawood & Co

Haines, C.J.

for attacking the whole contract. However, I do not think that that is any reason for coming to the conclusion that a suit such as the present one is impliedly barred by sections 32 and 33 of the Arbitration Act. If the legislature had intended that a suit such as the present should be barred, the matter could have been easily put beyond doubt by framing section 33 in somewhat different words. If the words were: 'Any party to a contract containing an arbitration agreement or any person claiming under him desiring to challenge the existence or validity of the contract or arbitration agreement or to have the effect of either determined shall apply to the Court, etc.' that would have given the Court under the section jurisdiction to deal both with the contract as a whole or with the part of it relating to reference to arbitration. However, the section was drafted giving the Court power only to deal with the arbitration agreement or an award made thereafter.

If the contention for the respondent be accepted a somewhat startling consequence would follow. For example, if A puts forward a forged and bogus lease containing an arbitration clause and threatens to refer a purely bogus dispute with the owner B to arbitration. B would have no remedy whatsoever by suit because a suit brought for a declaration that the lease was bogus and a forgery and for its cancellation would be met by section 33 of the Arbitration Act. It would be suggested that as the bogus lease contained an arbitration clause no Court could adjudge the lease to be bogus and order its cancellation and that the only method which could be employed to attack the lease would be an application to the Court under section 33 for a declaration that the arbitration clause in the lease was bogus. It would follow that if the respondents' contention be correct then B could not get relief by cancellation of the document because section 33 does not provide for the granting of such relief.

The right given to citizens to protect their interests by suits cannot be too readily taken away. The legislature can of course do so. But it must do so by clearing terms or by necessary implication. The Court should not infer that a right of suit has been taken away because such an inference is possible from some subsequent legislation. The inference that a right to suit has been taken away must I think be inevitable before it can be held that

the right of suit has been taken away by necessary implication by some legislative enactment.

I entirely agree with my brother Banerjee that sections 32 and 33 on their true construction do not purport to deal with suits for declarations that there never was a contract or that a contract is void. The sections must be confined to attacks on arbitration agreements and awards and the fact that an arbitration agreement may fall with the contract does not prevent the Court declaring in a properly constituted suit that there never was a contract at all or that the contract is void and of no effect.

N. C. Bural & Pyne, Solicitors for the Appellant.

A. P. Roy & Co., Solicitor for the Respondent.

S.K.R.C.

Appeal allowed.

CIVIL.

1951.

The State of
Bombay.

v.

Adamyce Hajee
Dawood & Co

Harries, C.J.

CIVIL.

ORIGINAL CIVIL.

1951.

March, 15.

Before the Hon'ble Mr. Justice H. K. Bose.

SARKAR & BROTHERS (PROPERTIES) LTD.

v.

ANIL KUMAR DUTT AND OTHERS.*

West Bengal Premises Rent Control (Temporary Provisions) Act 1948 (Act XXXVIII of 1948)—Section 4—Selami or premium—meaning of;—Constitution of India—Article 226—Writ of Certiorari—if can be issued when Controller wrongly decides a payment as premium.

Where a lessee agrees to pay, and pays, a sum of money to the lessor, towards costs of repairs, and such payment is made as price for purchasing an additional benefit, viz. a better and improved premises, which he would not otherwise get, if he had simply taken a lease of the premises in its original condition, the payment is not by way of "Selami" or "premium," within the meaning of West Bengal Premises Rent Control (Temporary Provisions) Act 1948.

(1) *King v. Earl Cadogan*: (1915) 3 K.B. 485 at p. 492, (C.A.); S.C. (1915) 1 K.B. at p. 826.

(2) *R. v. Birmingham Rent Tribunal* (1951) 1 All E.R. 198, at p. 201, 202-203 referred to.

In order to find out whether a payment is prohibited by statute or not the Court should not confine itself to the terms of the lease but is bound to look at the transaction as a whole and consider whether it is within the prohibition of the Act.

Regor Estates Ltd. v. Wright: (1951) 1 All. E.R. 219 referred to—

A writ in the nature of Certiorari can be issued if the Rent Controller wrongly determines that a certain payment is in the nature of premium

(1) *R. v. Fulham, Hammersmith and Kensington Rent Tribunal* (1950) All. E.R. 211.

(2) *R. v. Barnet*: (1950) 2 All. E.R. 216.

(3) *R. v. City of London etc. Rent Tribunal*, (1951) 1 All. E.R. 195, at 198 referred to.

Subimal C. Roy and A. N. Sen for the Applicant.

R. C. Deb and S. C. Ghosh for the Respondent.

* In the matter No. 76 of 1950 under Article 226 of the Constitution of India.

Bose, J.—This is an application under Article 226 of the Constitution for a Writ in the nature of Certiorari and for other writs mentioned in the petition, for cancellation or quashing of certain orders passed by the Judge, 4th Bench of the Court of Small Causes, Calcutta and by the Rent Controller, Calcutta, dated the 4th of August 1950 and 13th January 1950 respectively and also for direction calling upon them and the other respondents to forbear from taking steps or from executing or giving effect to the said orders.

CIVIL

1951.

Sarkar & Bros.

v.

Anil Kumar Dutt

Bose, J.

On the 13th of January 1948 the respondent No. 1, Anil Kumar Dutt became a lessee under Messrs. Sarkar & Bros. a firm under an indenture of lease in respect of a shop room situated at premises No. 2, Maharshi Debendra Road in Calcutta. Under a similar indenture of lease of the same date respondent Girish Chandra Daw & Sons also became a lessee under the said Messrs. Sarkar & Bros. in respect of another shop room situated in the said premises. Both the leases were for a period of 30 years commencing from the 1st day of January 1949. Under the said leases the respondents 1 and 2 agreed to pay a sum of Rs. 2,500/- each on or before the execution of the leases and a further sum of Rs. 1,000/- within one month from the date of commencement of the leases towards costs of repairs to the said premises for the purposes of development thereof. A sum of Rs. 2,500/- was paid by each of the respondents 1 and 2 on or about the 30th January 1948. On or about 22nd April 1948 the petitioner company Sarkar & Bros. (Properties) Ltd. was incorporated. On the 7th of September, 1948 the said leases and all benefits and advantages thereof were assigned in favour of the petitioner company by the firm of Sarkar & Bros. and the respondents 1 and 2 attorned to the petitioners as tenants in respect of the said shop rooms. On or about 31st January 1948 the respondents 1 and 2 paid the respective sums of Rs. 1,000/- each to the petitioners. In the month of June and July 1949 the respondents 1 and 2 instituted proceedings before the Rent Controller, Calcutta for refund of the said sums of Rs. 2,500/- and Rs. 1,000/- paid by each of them on the ground that they were salami moneys which the petitioners or its predecessor-in-interest was not entitled to receive in law. The two cases were heard together by the Rent Controller and by his judgment and order dated the 13th of January 1950 the Rent Controller came to the

CIVIL.
 —
 1951.
 Sarkar & Bros.
 v.
 Anil Kumar Dutt
 —
 Bose, J.

finding that the claims for the sum of Rs. 2,500/- were barred but that the two sums of Rs. 1,000/- paid by respondents 1 and 2 were *salamis* which the petitioner was prohibited from receiving under the provisions of the Rent Control Act 1948 and directed the petitioner to refund the said amounts to respondents 1 and 2 and imposed a fine of Rs. 250/- in each of the cases on the petitioner. Being aggrieved by the said order and judgment of the Rent Controller the petitioner preferred appeals in the Court of Small Causes, Calcutta. The respondent No. 3 the Judge, presiding over the 4th Bench of the Court of Small Causes heard these appeals and by his judgment and order dated the 4th August 1950 the learned Judge upheld the order and judgment of the learned Rent Controller. In the circumstances the petitioner has moved this Court for the reliefs stated above.

It is contended by Mr. Subimal Roy the learned Counsel for the petitioner that the findings of the Rent Controller and the Judge of the Small Causes Court that the two sums of Rs. 1,000/- were received by way of Salami are erroneous and the Rent Controller and the learned Judge had not jurisdiction to direct refund of the sums or to impose any penalty as they have purported to do. The learned Counsel has referred me to Ayer's Law Lexicon page 1144 and Wilson's Glossary page 730 for the meaning of the word "salami." In Mr. Ayer's book "salami" is stated to be "A free gift made by way of compliment or in return for a favour." In Wilson's Glossary it has been pointed out that the word is used in different senses including its being used in the sense of gratuity or offering on receiving a lease or settling for the revenue or on receiving a favour real or implied. Reference was also made to decisions of this Court reported in *Maharaja Birendra Kishore Manikya v. Secretary of State for India* (1) and *Emperor v. Probhat Chandra Barua* (2). These cases illustrate that the word "Salami" has different connotations in respect of different subjects such as when it is used in case of transfer of holding from one tenant to another or in respect of leases or settlements of properties under the Bengal Tenancy Act or the Transfer of Property Act.

The learned Counsel has also placed reliance on the case of *King v. Earl Cadogan* (3), in which it was held that where pur-

(1) 32 C.L.J. 433, at 444 (bott. 445).

(2) A.I.R. (1927) Cal. 793.

(3) (1915) 3 K.B. 485 (C.A.).

suant to an agreement for lease of licensed premises made before 1910, the lessee has expended a large sum in rebuilding the premises and surrendered unexpired lease of the premises and the lessor has then granted the lease, neither the sums so expended nor the surrender value of the prior lease is a "premium" payable by the lessee within the meaning of Section 2 of the Finance Act 1912. Warrington, I.J. observed as follows at page 492:

CIVIL.

1951.

Sarkar & Bros

v.

Anil Kumar Dutt

Bose, J.

"The Legislature in expressing its intention has chose to use two words 'Rent' and 'Premium' both of which in connection with leases have perfectly well known legal meanings. I need not say anything about the meaning of the word 'rent' but premium as I understand it used as it frequently is in legal documents—means a cash payment made to the lessor and representing or supposed to represent the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease. Is it possible by any means to give to either of these items which the plaintiff seeks to bring in the meaning of the word 'premium.' It seems to me that it is quite impossible. The expenditure on the house is not in any sense a premium and still less is the value of the surrendered lease as to which it seems very doubtful whether the landlord ever got the benefit of it at all."

In (1915) 1 Kings Bench (1) Ridley J. when dealing with the same case observed as follows (page 826):

"Premium means a consideration passing in lieu of rent from the tenants to the landlord generally speaking upon the grant of a lease. In a sense it is capitalised rent something that is payable not as an annual rent but as a payment down to take the place or part of what otherwise would be calculated and paid as an annual rent."

Later on, the same learned Judge observed:

(1) (1915) 1 K.B. 821.

CIVIL.

1951.

Sarkar & Bros

v.

Anil Kumar Dutt

Bose, J.

"I think it is impossible to say that the money which the tenant agreed to expend in pulling down and restoring and improving these premises is a premium. The landlord did not receive etc. . . . the tenant also is getting the benefit of that he is having better premises instead of the old premises. That seems to me to be totally different thing from a premium."

Mr. Roy submits that the petitioner or its predecessor in interest had to pay under an order of Court a sum of Rs. 55,000/- to the Official Receiver for the purpose of effecting alterations and improvement to the premises in suit. The respondents 1 and 2 by agreeing to contribute Rs. 3,500/- each towards the said cost of repairs and by paying the said sum did not pay the sums by way of *salami* or premium but as price for purchasing an additional benefit, viz., a better and improved premises which they would not ordinarily get if they had simply taken a lease of the premises in its original condition.

The observations made by Warrington L.J. were quoted with approval by Hilbery J., in *R. v. Birmingham Rent Tribunal* (1), and the learned Judge explained what the true legal sense of the word "Premium" was.

Mr. Roy refers to Section 4 of the Rent Control Act 1948 and submits that in the Bengal Act the terms "Premiums" and "Salami" are used in the same sense in which the word "premiums" understood in the English Rent Control Acts. In my view this contention of the learned Counsel is sound and the payment of Rs. 3,500/- agreed to be paid by the tenants towards the costs of the repairs and improvements which were in fact effected cannot be said to partake of the character of "Premium" as the term is understood in its strict legal sense. The words "In consideration of" in the Indenture of lease are not two sums of Rs. 3,500/- by each of the respondents Nos. 1 and 2.

In the case of *Regor Estates Ltd. v. Wright* (2), where the conditions of the grant of the lease were similarly worded (page 220 bottom) it was held that the payment stipulated was not a

(1) (1951) 1 All. E.R. 198 at 202-3.

(2) (1951) 1 All. E.R. 219.

contravention of the Rent Control Act. It was pointed out quoting relevant passages from various decisions bearing on the subject that the Court should not confine itself to the terms of the lease but is bound to look at the transaction as a whole and consider whether it is within the prohibition of the Acts. The Court is not bound by the vocabulary the parties have chosen to use." The parties may write the agreement in such terms as they please and if so minded may attach label they wish to the payments agreed to be made by the lease but no label may accurately describe a fact or it may misdescribe it or may help to the solution of a doubtful question of interpretation.

CIVIL.

1951.

Sarkar & Bros.

v.

Anil Kumar Dutt

Bose, J.

The stipulation for payments of Rs. 3,500/- each by the respondents Nos. 1 and 2 have no relation to the rent of the premises but it was a personal obligation undertaken in order to secure a better and improved property for the tenants which they would not otherwise have got by merely taking a lease of the property as it was in its original condition before the improvement.

It may be that the respondents Nos. 1 and 2 would not have got the shops or the leases if they had not agreed to reimburse the landlord towards the costs of repairs but that does not change the character of the payments and convert them into Salami or premium in the strict legal sense as defined by Warrington L. J. See in this connection *R. v. Birmingham Rent Tribunal* (1).

I hold that the sums of Rs. 3,500/- paid by respondents Nos. 1 and 2 were not premium or salami and were not payments in contravention of the Rent Control Act 1948. Reference was made by Mr. R. C. Deb to section 105 of the Transfer of Property Act but it does not throw any further light on the point.

It was contended by Mr. R. C. Deb the learned Counsel for the Respondents 1 and 2 that as the Rent Tribunal has jurisdiction to determine whether a certain payment was Salami or not and it has decided such question the fact that it has arrived at an erroneous conclusion that a salami or premium had been paid does not enable the Court to grant an order of Certiorari. Reliance is placed on *The King v. Woodhouse* and others (2),

(1) (1951) 1 All. E.R. 198 at p. 201-2.

(2) (1906) 2 K.B. 501 at 514-516.

CIVIL.

1951.

Sarkar & Bros

v.

Anil Kumar Dutt

Bose, J.

It is clear however from the provisions of the Rent Control Act (Sections 7 and 33) that the Rent Controller has no jurisdiction to direct refund of money or impose any penalty unless he decides that the money paid or received was a Salami or premium. This condition precedent must be fulfilled before the Rent Controller can have any jurisdiction to direct refund or impose the fine.

In construing the English Rent Control Act 1949 where the jurisdiction was conferred in similar terms to determine the Rent Equivalent the Courts in England have held that a Writ of Certiorari could be granted if the Rent Tribunal wrongly determined that a certain payment was in the nature of a "premium" and both the Certificate as to the payment being a "premium" and the determination as to Rental Equipment could be quashed by a Writ of Certiorari. See *R. v. Fulham Hammersmith and Kensington Rent Tribunal* (1) and *R. v. Barnett* (2).

The case of *R. v. Fulham Hammersmith and Kensington, Tribunal* has been explained and re-affirmed by Parker J. in *R. v. City of London etc. Rent Tribunal Ex parte Honig* (3), while dealing with the question of jurisdiction of Rent Tribunals to decide collateral facts in reference brought before the Rent Tribunals.

In the result the petition succeeds and the Rule is made absolute. The orders of the Judge 4th Bench Small Causes dated the 4th August 1950 in Appeal Nos. 337 and 338 of 1950 and the orders of the Rent Controller dated the 13th January 1950 in cases No. 2262A/49 and 2602A/49 are quashed. The petitioners are entitled to costs of this application to be paid by the Respondents Nos. 1 and 2.

S.K.R.C.

Rule made absolute.

(1) (1950) 2 All. E.R. 211.

(2) (1950) 2 All. E.R. 216.

(3) (1951) 1 All. E.R. 195 (198).

CIVIL REVISION

Before The Hon'ble Mr. Justice Himansu Kumar Bose.

SK. MANGRU MEYA AND OTHERS

v.

COMMISSIONERS OF THE BUDGE BUDGE
MUNICIPALITY AND OTHERS.*

CIVIL.

1951

March, 16

Constitution of India, Article 226—Closing down slaughter house under a resolution of Municipality—resolution exceeding jurisdiction and power conferred, by statute—yet in conformity with the Directive principles under Article 48—if can be interfered with—Alternative remedy—if always a bar in issuing directions—Section 531 Bengal Municipal Act—Appeal—only against orders passed under the Act.

Municipality exceeding its jurisdiction and power under the Bengal Municipal Act passed a resolution closing down slaughter houses. Such resolution justified by the Directive principles under the Constitution—Held the directive principles are not enforceable by any Court and there being no law enacted for closing down slaughter houses, proper direction is available under Article 226.

Although a right of appeal generally exclude the remedy by way of Mandamus, yet it is to be considered if such alternative remedy will be an adequate one in the facts and circumstances of each case.

Rashid Ahmed v. Municipal Board, Kairan and another A.I.R. 1950 S.C. 163 (165).

The resolutions being in the nature of general determination and not an order or decision in respect of any particular application for grant or renewal of license no appeal lay under section 531 of the Bengal Municipal Act; unless the order to be appealed against is an order made under the Act no question of preferring appeal does arise to preclude a remedy under Article 226 of the Constitution

Moti Lal and others v. Govt. of the State Uttar Pradesh. A.I.R. 1951 All. 257.

B. T. S. Ltd. v. Himachal Pradesh. A.I.R. 1951 Him. Pra. 36 at p. 40 relied on.

Messrs. G. P. Kar and Nirmal Chandra Chaudhury for the Petitioner.

* Civil Revision Case No. 159 of 1951. In the matter of an application under Article 226 of the Constitution of India.

CIVIL.

Mr. Purnendu Sekhar Basu for the Opposite Party.

1951.

Mangru Meya
v.
Commissioners of
the Budge Budge
Municipality.

March, 16.

Bose, J.:—This is an application under Article 226 of the Constitution for a Writ in the nature of Mandamus directing the Respondents to cancel or withdraw the notice dated the 27th of February 1950, served on the petitioners and also for an order for cancellation of the Resolution dated the 24th of February 1950 passed by the Respondents, and for direction calling upon the Respondents to forbear from giving effect to the said resolution and/or the said notice.

The petitioners are the owners of two Beef shops in Ward No. 4 Charial, Budge Budge, in the District of 24 Parganas. The petitioner No. 3 is the nephew of petitioners Nos. 1 and 2 and one of the said Beef shops is stated to have come into existence 100 years ago. The area in which the shops are situated is an industrial area and it is stated that it is inhabited predominantly by Mohamadans. It is alleged that Beef is one of the staple food of Mohamadans particularly the poorer section of that community and due to the persistent demands of the local people two other shops besides the two shops belonging to the petitioners came into existence about thirty years ago and have been in the locality ever since. The petitioners have been at all material times holders of licences from the respondent Municipality granted under section 370(1) of the Act for carrying on the said business of sale of Beef and meat in the locality and at no point of time they contravened any of the terms or conditions of the licence in any way as to be a cause of annoyance or offence or danger to persons residing in or frequenting the immediate neighbourhood. In middle of February 1950 one Pandit Ram Chandra Awasthi, an orthodox up-country Brahmin was appointed Chairman of the said Municipality. At a meeting of the Commissioners of the Municipality held on the 24th of February 1950 a resolution was purported to be passed in the following terms:—

“In view of the fact that due to indiscriminate slaughter depletion of cattle wealth—the backbone of this country has become the order of the day and in as much as acute shortage of draught animals and paucity in milk supply has brought in their wake, woes and miseries in abundance and because providing an adequate diet full of milk is one of the main factors

in building up of a strong nation of healthy and happy inhabitants, resolved that with a view to increasing the yield of milk and cattle wealth and their progeny for the general economic uplift of the masses specially the agricultural produces of the country, the municipal slaughter house for slaughtering cow, bull, bullock or buffaloes, be closed down with effect from 1st March 1950 and further resolved that no licence under Sections 408 and 418 be issued for slaughtering or for sale of beef or flesh of such animals within the municipal area, excepting on bonafide religious festivals and on ceremonial occasions.

CIVIL.

1951.

Mangru Mey;

v.

Commissioners
the Budge Bud
Municipality.

Bose, J.

It is also resolved that the services of the watchman of Municipal Slaughter House be dispensed with from 1st March 1950 on payment of one month's salary in lieu of Notice."

On the 27th of February 1950 the petitioners were served with a Notice under the signature of Mr. Awasthi, the Chairman of the Municipality to the following effect:—

To

Shaik Mangru Mia and others,

Beef Stall Holder, Trunk Road, Charial,

Budge Budge, Dated the 27th February, 1950.

Dear Sir,

With a view to increase the supply of milk and cattle wealth and their progeny the Commissioners of the Budge Budge Municipality in their special meeting held on the 24th February 1950 have decided to close down the Municipal Slaughter House and no licence for slaughtering or for sale of beef or flesh of buffaloes etc. will be issued henceforth. This will come into effect from the 1st March 1950 which please note.

Yours faithfully,

It is stated that the said Resolution and the notice are ultravires, illegal and malafide, and constitute violation of the fundamental rights of the petitioners guaranteed under article 19(1) (g) of the Constitution of India. It appears that after the service of the notice on the petitioners the latter made various representations to the various authorities, viz., the Additional

CIVIL.
 1951.
 Mangru Meya
 v.
 Commissioners of
 the Budge Budge
 Municipality
 —
 Bose, J

District Magistrate, Alipore, 24 Parganas, The President of the District Minority Board, 24 Parganas, the Chairman of the Members of the Minority Commission, West Bengal and to other persons and also made representations to the respondents but neither the respondents nor the other authorities aforesaid had paid any heed to such representations and they have denied justice to the petitioners. The petitioners made various applications for renewal of the licences and the last of such applications was made on the 22nd of February 1950. The respondents, however, had not entertained the said applications.

Mr. G. P. Kar, the learned Counsel for the petitioners has referred me to Section 370 (2) of the Bengal Municipal Act (XV of 1932) and has contended that the only grounds on which the grant or renewal of a licence can be withheld by the Municipality are those mentioned in that Section. The Municipality is a creature of statute and their powers and duties are confined within the four corners of the statute. The Municipality has no power to refuse or withhold a licence except for reasons expressly specified in the section. Section 370 (2) is as follows:—

“A licence for any of the purposes mentioned in Sub-Section (1) shall not be withheld unless the Commissioners at a meeting have reason to believe that the business which it is intended to establish or maintain would be a cause of annoyance, offence or danger to persons residing in or frequenting in the immediate neighbourhood or that the area should be for general reasons kept clear of the establishment of such business”

It is clear from the wordings of the resolution and the wordings of the notice dated the 27-2-50 that the reasons for closing down the Slaughter House and for not renewing or issuing the licence are not those specified in the section. The Municipality has taken into consideration extraneous matters in passing the resolution and in issuing the notice complained of and has thus exceeded its jurisdiction or powers conferred by the statute. Neither the resolution nor the notice is warranted by the terms of the statute. Under Section 370(2) it is incumbent upon the Commissioners to grant the licence unless the grounds on which the licence may be withheld and which are specified in the section, exist in any particular case.

The learned Advocate appearing for the respondents relies on Article 48 of the Constitution which is as follows:—

“The State shall endeavour to organise Agriculture and Animal Husbandry on modern and scientific lines and shall in particular take steps for preserving and improving the products and prohibiting the slaughter of cows and calves and other milch and draught cattle.”

He points out that the words “State” in this Article includes the local Authority such as the respondent Municipality and reference is made for this purpose to Article 36 and Article 12 of the Constitution. It is argued on behalf of the respondents relying on these articles that the resolution passed by the Municipality was a valid one and was within the competence of the Commissioners to pass it. It may be noted that Article 48 is one of the Directive Principles of State policy. These are only fundamental principles for the governance of the country and they are not enforceable by any Court but such principles are to be applied in making laws of the State (Article 37). There has been no law enacted for general closing down of the slaughter houses or forbidding the carrying on of the business of sale of beef in the State or in the Indian Union. The Bengal Municipal Act is an existing law which has continued in force even after the commencement of the Constitution. The Commissioners of the respondent Municipality must act within the four corners of this statute and they cannot travel beyond the statute and take shelter under Article 48 for the purpose of justifying the resolution or the notice complained of in this application.

In my view the petitioners have made out a case for interference by this Court in respect of the acts complained of.

It is contended by the learned Advocate for the respondent Municipality that the petitioners had an alternative remedy by way of an appeal to the Provincial Government under section 531 of the Act and in the circumstances the petitioners cannot be allowed to have recourse to this extraordinary remedy under Article 226. It is argued that if the petitioners had appealed under section 531 the Provincial Government could have granted

CIVIL.

1951.

Mangru Meya

v.

Commissioners of
the Budge Budge
Municipality.

Bose, J.

CIVIL.

1951.

Mangru Meya

v.

Commissioners of
the Budge Budge
Municipality.

Bose, J.

the petitioners complete and adequate relief by virtue of the controlling powers vested in the Government under sections 548 and 549 of the Act read with the said Section 531.

It is well settled that the existence of an alternative remedy does not operate as an absolute bar to the grant of prerogative writs, under the extraordinary jurisdiction of the Court. It is true that the Court will as a general rule and in the exercise of its discretion refuse . . . a Writ of Mandamus when there is an alternative specific remedy at law which is not less convenient, beneficial and effective. It has no doubt been held that if a right of an appeal is provided by any statute, that may exclude the remedy by writ of mandamus; but it is a matter to be considered in the facts and circumstances of each case whether such remedy by way of appeal will be an adequate remedy for the redress of the petitioners' grievances *Rashid Ahmed v. Municipal Board Kairan* and another (1)).

In order that the petitioners can avail of Section 531 of the Act there must be a definite order refusing a licence required under the Act. The resolution of the 24 of February and the notice dated the 27th of February served on the petitioners cannot be considered as a definite order refusing a licence within the meaning of Section 531 of the Act. These are in the nature of general determinations and not an order or decision in respect of any particular application for grant or renewal of licences. In fact no order has been passed in respect of the applications made for renewal by the petitioners. Moreover the resolution and the Notice embody decisions which are outside the ambit of the Act. As pointed out in *Moti Lal v. State of Uttar Pradesh* (2) and *B. T. S. Ltd. v. State of Himachal Pradesh* (3), unless the order to be appealed against is an order made under the Act no question of preferring an appeal does or can arise. In my view the petitioners are not precluded by reason of the remedy of appeal contained in Section 531 of the Act from applying to this Court for directions under Article 226 of the Constitution.

It was contended by the learned counsel for the petitioners that the resolution and the notice are malafide. I do not think

(1) A.I.R. (1950) S.C. 163 (165).

(2) A.I.R. (1951) All. 257 (para. 33, 160, 161).

(3) A.I.R. (1951) Him. Pra. 36 (40).

that the petitioners have on the facts of this case sufficiently made out a case of malafide. The conflicting affidavits which have been filed in these proceedings do not justify me in coming to the conclusion that the conduct of the respondent Municipality in passing the resolution or issuing the notice complained of is tainted with want of good faith.

In the result the petition succeeds and the rule is made absolute. The resolution dated the 24th of February 1950 and the notice dated the 27th of February 1950 are cancelled and the respondents are directed to forbear from giving effect to the resolution and/or the said notice, and they are further directed to determine the applications of the petitioners for renewal of licences according to law. There will be no orders as to costs.

S.D.G.

Rule made absolute.

CIVIL REVISION.

Before Mr. Justice G. N. Das and Mr. Justice S. C. Lahiri.

SREEMATI MATANGINI DASSI

v.

KSHIRODE NARAYAN BHUNIA AND OTHERS.*

CIVIL.

1951.

April, 17.

Partition Suit—Compromise decree in a prior partition suit—prayer for declaration that prior decree not binding on ground of fraud and to set aside the decree if necessary and for partition—setting aside decree if the main relief. Jurisdiction—of a co-ordinate court to entertain a suit for setting aside a decree passed by another court.

After an earlier partition suit ended in compromise with the plaintiffs mother, plaintiff instituted a partition suit claiming partition of his 1/4th share praying *inter alia* for a declaration that the earlier decree is not binding upon him as the same was obtained by fraud and not in settlement of a bonafide dispute and for setting aside the decree if necessary—Held, that the prayer for partition was the main relief and other prayers were ancillary. It may be a bar to the plaintiff getting the relief by way of partition only if the allegations made by her be not true. The allegations must be accepted as true at this stage (consideration of pauperism).

* Civil Revision Case No. 44 of 1951 against the order dated 2nd of December, 1950 passed by the Subordinate Judge and Court Midnapore in Misc. J. Case No. 29 of 1950.

CIVIL.

—

1951.

Sm. Matangini
Dassi

v.

Kshirode
Narayan Bhunia

The fact that there was a previous compromise decree in Alipore Court may be under certain circumstances a bar to the successful prosecution of the suit by the plaintiff but when the plaintiff was not required to set aside the decree, the question of jurisdiction of Midnapore Court to set aside the decree of a Court of co-ordinate jurisdiction at Alipore did not arise.

Application by the Plaintiff.

The material facts will appear from the judgment.

Messrs. Atul Chandra Gupta, Bholanath Roy and Smriti Kumar Roy Chaudhury for the petitioner.

Messrs. Sitaram Banerji, Saroj Kumar Maity and Nirmal Chandra Sen for the opposite parties.

The judgment of the court was as follows:—

April, 17

Das, J.:—This is an application in revision at the instance of the plaintiff and is directed against an order of Mr. D. N. Chakraborty, Subordinate Judge, 2nd Court, Midnapore dated the 2nd of December, 1950, directing an application filed by the petitioner for leave to file her suit in forma pauperis to be returned for presentation to the proper Court. Shortly stated, the plaintiff's case is that she was entitled to $\frac{1}{4}$ th share in the properties in dispute as heiress to her father consequent on a deed of relinquishment executed by her mother Soudamini Dasi. In the plaint the plaintiff recites a family pedigree and states the circumstances under which her father came to have a fourth share in the disputed property. In that plaint the plaintiff recites a previous decree made in a partition suit, (Suit No. 82 of 1920) of the Court of Subordinate Judge, 4th Court, Alipore, instituted by Upendra and Promotha against her mother Soudamini which resulted in a compromise. In the plaint she alleges further, that this compromise decree was obtained by fraud and that it was not in settlement of a bonafide dispute and was not fairly obtained and was not binding on her as reversioner. In prayer (Ka) the plaintiff prays for leave to file the suit as a pauper. In prayer Kha of the plaint the plaintiff prays for a declaration that the decree in the said suit was not binding on her and if necessary the said decree may be set aside. In prayer Ga of the plaint she prays for partition of her $\frac{1}{4}$ th share in the

disputed property. There are ancillary prayers in the plaint to which it is not necessary to refer. Before the Subordinate Judge both parties asked the Court to decide first the question whether the Midnapore Court had jurisdiction to hear the suit. This prayer was made for the sake of convenience. The Subordinate Judge accordingly dealt with this matter. In his opinion the plaintiff was required to have the decree of the Subordinate Judge, 4th Court, Alipore, set aside. The Subordinate Judge thereupon held that the Midnapore Court had no jurisdiction to set aside the decree passed in the Alipore Court and on this ground he came to the conclusion that the proper court in which the suit, as framed, could be filed was not the Midnapore Court but the Court at Alipore. In the result, as I have said, he directed the application to be returned for presentation to the proper court. No finding was reached by the Subordinate Judge on the question whether the plaintiff was a pauper or not. It is the propriety of the order of the Subordinate Judge which is in question before us.

CIVIL.
—
1951.
Sm. Matangini
Dassi
v.
Kshirode
Narayan Bhunia
—
Das, J.

Mr. Gupta appearing for the petitioner has contended that the Subordinate Judge, Midnapore, was entitled, and had jurisdiction, to decide the claim for partition made by the plaintiff. The plaintiff anticipated the defence which might be filed and prayed for a declaration that the decree of the Court of the 4th Subordinate Judge, Alipore was not binding on the plaintiff and if necessary might be set aside. He contended that it is wholly irrelevant to decide the question whether the Subordinate Judge in Midnapore had jurisdiction to set aside the decree of the Alipore Court. In our opinion, this contention is correct. The plaintiff was praying for a partition of her $\frac{1}{4}$ th share as the heiress to the last full owner, namely, her father. The properties in dispute lay partly within the jurisdiction of the Midnapore Court. The Midnapore Court had therefore jurisdiction to try the suit for partition which was the main relief, which the plaintiff prayed for in her plaint. The other prayer for a declaration that the decree in the Alipore Court was not binding on the plaintiff and if necessary might be set aside, was a mere ancillary prayer. On the allegations made in the plaint the declaration necessarily follows. There is no question of setting aside the said decree. The fact that there was a previous compromise decree in the Alipore Court may be under certain cir-

CIVIL.

1951.

Sm. Matangini

Dassi

v.

Kshirode

Narayan Bhunia

Das, J.

cumstances a bar to the successful prosecution of the suit by the plaintiff. The plaintiff was not required to set aside the said decree.

Mr. Banerjee for the opposite party contended that the main relief was the claim for declaration that the decree in the Alipore suit was not binding on the plaintiff and that it required to be set aside. Mr. Banerjee contended that *prima facie* the decree is binding and unless the plaintiff has the said decree set aside she cannot get her relief for partition, the relief by way of partition being consequential on the plaintiff succeeding in getting a declaration of the invalidity of the decree in the earlier part of the suit. In my opinion this is not the proper view to take of this matter. The prayer for declaration that the decree is not binding on the plaintiff is not the main relief. Supposing the plaintiff was allowed this relief it would not help her at all. The relief which she really prays for is the relief by way of partition. The plaintiff in order that she can get a decree for partition of her share is not bound to set aside that decree. It may be a bar, as I have said, to the plaintiff getting her relief by way of partition only if the allegations made by her be not true. At this stage we must accept the allegation to be true. In this view no question arises about the jurisdiction of the Midnapore Court to set aside the decree passed by another court of co-ordinate jurisdiction at Alipore. The view taken by the Subordinate Judge in my opinion cannot be sustained. On the allegations made in the plaint the Midnapore Court has jurisdiction to decide the suit. The order of the Subordinate Judge must therefore be set aside. The Subordinate Judge has not dealt with the fact of pauperism. The matter will go back to the Subordinate Judge in order that he may decide the question whether the plaintiff is a pauper or not.

The rule is accordingly made absolute with costs,—hearing fee two gold mohurs.

Lahiri, J.:—I agree.

S.D.G.

Rule made absolute.

SUPREME COURT.

CIVIL.

1951.

April, 9.

Present: The Hon'ble Chief Justice Harilal J. Kania, Mr. Justice Saiyid Fazl Ali, Mr. Justice M. Patanjali Sastri, Mr. Justice Mehr Chand Mahajan, Mr. Justice Bijan Kumar Mukherjea, Mr. Justice Sudhi Ranjan Das and Mr. Justice Vivian Bose.

THE STATE OF MADRAS

v.

SM. CHAMPAKAM DORAIRAJAN*

and

THE STATE OF MADRAS

v.

C. R. SRINIVASAN*

Constitution of India Article 29(2)—admission into an educational institution maintained by the State—proportion fixed in the communal G.O.—whether any infringement of fundamental rights under the Article—whether the Provisions of Article 46 of the Constitution override the Provisions of Article 29(2)—fundamental rights under the Constitution how far affected by other Provisions of the Constitution.

The right to get admission into an educational institution of the kind mentioned in Clause (2) of Article 29 of the Constitution is a right which an individual citizen has as a citizen and not as a member of any community or class of citizen. The right is not to be denied to the citizen on grounds of religion, race, caste, language or any of them.

The omission from Article 29 of a clause similar to clause (4) of Article 16 significantly indicates that the intention of the Constitution was not to introduce communal considerations in matters of admission into an educational institution maintained by the State.

The Chapter of Fundamental Rights in the Constitution is sacrosanct and not liable to be abridged by legislative or executive act or order, except to the extent provided in the appropriate Article in part III. The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.

* Civil Appeals Nos. 270 and 271 of 1951 against the judgment and order dated the 27th July, 1950, of the Madras High Court in Civil Miscellaneous petition No. 5225 of 1950.

CIVIL. Appeal by the State of Madras

1951.

The State of
Madras

v.

Sm Champakam
Dorairajan and
another.

Two separate applications under Article 226 of the Constitution complaining of breach of the petitioners' fundamental rights to get admission into an educational institution maintained by the State of Madras.

The material facts will appear from the judgment.

Shri V. K. T. Chari, Advocate-General, Madras, (Shri R. Ganpathy Iyer, Advocate, with him), instructed by Shri P. A. Mehta, Agent. For the Appellant.

Shri Alladi Krishnaswami Iyer, Senior Advocate, (Shri Alladi Kuppaswami Iyer, Advocate, with him), instructed by Shri M. S. K. Sastri, Agent. For the Respondents in both the cases.

The judgment of the Court was delivered by:—

April, 9.

Das, J.:—This judgment covers both Case No. 270 of 1951 (*State of Madras v. Srimathi Champakam Dorairajan*) and Case No. 271 of 1951 (*State of Madras v. C. R. Srinivasan*) which are appeals from the judgment passed by the High Court of Judicature at Madras on July 27, 1950, on two separate applications under article 226 of the Constitution complaining of breach of the petitioners' fundamental right to get admission into educational institutions maintained by the State.

The State of Madras maintains four Medical Colleges and only 330 seats are available for students in those four Colleges. Out of these 330 seats, 17 seats are reserved for students coming from outside the State and 12 seats are reserved for discretionary allotment by the State and the balance of the seats available are apportioned between four distinct groups of districts in the State.

Likewise, the State of Madras maintains four Engineering Colleges and the total number of seats available for students in those Colleges are only 395. Out of these, 21 seats are reserved for students coming from outside the State, 12 seats are reserved for discretionary allotment by the State and the balance of the seats available are apportioned between the same four distinct groups of districts.

For many years before the commencement of the Constitution, the seats in both the Medical Colleges and the Engineering Colleges so apportioned between the four distinct groups of districts used to be filled up according to certain proportions set forth in what used to be called the Communal G.O. Thus, for every 14 seats to be filled by the selection committee, candidates used to be selected strictly on the following basis:—

Non-Brahmin (Hindus)	6
Backward Hindus	2
Brahmins	2
Harijans	2
Anglo-Indians and Indian Christians	1
Muslims	1

CIVIL.
—
1951.
The State of
Madras
v.
Sm. Champakam
Dorairajan and
another.
—
Das, J

Subject to the aforesaid regional and what have been claimed to be protective provisions selection from among the applicants from a particular community from one of the groups of districts used to be made on certain principles based on academic qualifications and marks obtained by the candidates. In the case of the Medical Colleges, not less than 20 per cent. of the total number of seats available for students of the State were filled by women candidates separately for each region, it being open to the selection committee to admit a larger number of woman candidates in any region if qualified candidates were available in that region and if they were eligible for election on merits *vis-a-vis* the men candidates in accordance with the general principles governing such admissions as laid down in those rules. It appears that the proportion fixed in the old Communal G.O. has been adhered to even after the commencement of the Constitution on January 26, 1950. Indeed, G.O. No. 2208, dated June 16, 1950, laying down rules for the selection of candidates for admission into the Medical Colleges substantially reproduces the communal proportion fixed in the old Communal G.O.

On June 7, 1950, Srimathi Champakam Dorairajan made an application to the High Court of Judicature at Madras under Article 226 of the Constitution for protection of her fundamental rights under Article 15 (1) and Article 29 (2) of the Constitution and prayed for the issue of a writ of *mandamus* or other suitable

CIVIL.

1951.

The State of
Madras

v.

Sm. Champakam
Dorairajan and
another.

Das, J.

prerogative writ restraining the State of Madras and all officers and subordinates thereof from enforcing, observing, maintaining or following or requiring the enforcement, observance, maintenance or following by the authorities concerned of the notification or order generally referred to as the Communal G.O. in and by which admissions into the Madras Medical Colleges were sought or purported to be regulated in such manner as to infringe and involve the violation of her fundamental rights. From the affidavit filed in support of her petition, it does not appear that the petitioner had actually applied for admission in the Medical College. She states that on inquiry she came to know that she would not be admitted to the College as she belonged to the Brahmin community. No objection, however, was taken to the maintainability of her petition on the ground of absence of any actual application for admission made by her. On the contrary, we have been told that the State had agreed to reserve a seat for her should her application before the High Court succeed. In the peculiar circumstances, we do not consider it necessary to pursue this matter any further. But we desire to guard ourselves against being understood as holding that we approve of a person who has not actually applied for admission into an educational institution coming to Court complaining of infringement of any fundamental right under Article 29 (2). The High Court by its judgment delivered on July 27, 1950 allowed this application of Srimathi Champakam Dorairajan. The State of Madras has now come up before us on appeal which has been numbered Case No. 270 of 1951.

Sri Srinivasan who had actually applied for admission into the Government Engineering College at Guindy, filed a petition praying for a *writ of mandamus* or any other writ restraining the State of Madras and all officers thereof from enforcing, observing, maintaining or following the Communal G.O. in and by which admission into the Engineering College was sought to be regulated in such manner as to infringe and involve the violation of the fundamental right of the petitioner under Article 15 (1) and Article 29 (2) of the Constitution. In the affidavit filed in support of his petition, the petitioner has stated that he had passed the Intermediate Examination held in March 1950 in Group 1, passing the said examination in first class and ob-

taining marks set out in paragraph 1 of his affidavit. It will appear that in the optionals which are taken into consideration in determining the academic test for admission in the Engineering College the petitioner Srinivasan secured 369 marks out of a maximum of 450 marks. The High Court has by the same judgment allowed this application also and the State has filed an appeal which has been numbered 271 of 1951. The learned counsel appearing for the State of Madras conceded that these two applicants would have been admitted to the educational institutions they intended to join and they would not have been denied admission if selections had been made on merits alone.

Article 29 which occurs in Part III of the Constitution under the head 'Cultural and Educational Rights' runs as follows:—

"(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

It will be noticed that while clause (1) protects the language, script or culture of a section of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens. This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, he certainly cannot be heard to complain of an infraction of his fundamental right under this Article. But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right.

CIVIL.

1951.

The State of
Madras

v.

Sm. Champakam
Dorairajan and
another.—
Das, J.

CIVIL.

1951.

The State of
Madras.

v.

Sm. Champakam
Dorairajan and
another.

Das, J.

The learned Advocate General appearing for the State contends that the provisions of this Article have to be read along with other Articles in the Constitution. He urges that Article 46 charges the State with promoting with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and with protecting them from social injustice and all forms of exploitation. It is pointed out that although this Article finds a place in Part IV of the Constitution which lays down certain directive principles of State policy and though the provisions contained in that Part are not enforceable by any Court, the principles therein laid down are nevertheless fundamental for the governance of the country and Article 37 makes it obligatory on the part of the State to apply those principles in making laws. The argument is that having regard to the provisions of Article 46, the State is entitled to maintain the Communal G.O. fixing proportionate seats for different communities and if because of that Order, which is thus contended to be valid in law and not in violation of the Constitution, the petitioners are unable to get admissions into the educational institutions, there is no infringement of their fundamental rights. Indeed, the learned Advocate General of Madras even contends that the provisions of Article 46 override the provisions of Article 29 (2). We reject the above noted contentions completely. The directive principles of the State policy, which by Article 37 are expressly made unenforceable by a Court cannot override the provisions found in Part III which, notwithstanding other provisions, are expressly made enforceable by appropriate Writs, Orders or directions under Article 32. The chapter of Fundamental Rights is sacrosanct and not liable to be abridged by any Legislative or Executive Act or order, except to the extent provided in the appropriate Article in Part III. The directive principles of State policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights. In our opinion, that is the correct way in which the provisions found in Parts III and IV have to be understood. However, so long as there is no infringement of any Fundamental Right, to the extent conferred by the provisions in Part III, there can be no objection to the State acting in accordance with the directive principles set out in Part IV, but subject again to the Legislative and Executive powers and limitations conferred on the State under different provisions of the Constitution.

CIVIL.

1951.

The State of
Madras

v.

Sm. Champakam
Dorairajan and
another.

Das, J.

In the next place, it will be noticed that Article 16 which guarantees the fundamental right of equality of opportunity in matters of public employment and provides that no citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of any employment or office under the State also includes a specific clause in the following terms:—

"(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments of posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State."

If the argument founded on Article 46 were sound then clause (4) of Article 16 would have been wholly unnecessary and redundant. Seeing, however, that clause (4) was inserted in Article 16, the omission of such an express provision from Article 29 cannot but be regarded as significant. It may well be that the intention of the Constitution was not to introduce at all communal considerations in matters of admission into any educational institution maintained by the State or receiving aid out of State funds. The protection of backward classes of citizens may require appointment of members of backward classes in State services and the reason why power has been given to the State to provide for reservation of such appointments for backward classes may under those circumstances be understood. That consideration, however, was not obviously considered necessary in the case of admission into an educational institution and that may well be the reason for the omission from Article 29 of a clause similar to clause (4) of Article 16.

Take the case of the petitioner Srinivasan. It is not disputed that he secured a much larger number of marks than the marks secured by many of the Non-Brahmin candidates and yet the Non-Brahmin candidates who secured less number of marks will be admitted into six out of every 14 seats but the petitioner Srinivasan will not be admitted into any of them. What is the reason for this denial of admission except that he is a Brahmin and not a Non-Brahmin. He may have secured higher marks than the Anglo Indian and Indian Christians or Muslim candidates but, nevertheless, he cannot get any of the seats reserved

CIVIL.

1951.

The State of
Madars

v.

Sm. Champakam
Dorairajan and
another.

Das, J.

for the last mentioned communities for no fault of his except that he is a Brahmin and not a member of the aforesaid communities. Such denial of admission cannot but be regarded as made on ground only of his caste.

It is argued that the petitioners are not denied admission only because they are Brahmins but for a variety of reasons, e.g. (a) they are Brahmins, (b) Brahmins have an allotment of only two seats out of 14 and (c) the two seats have already been filled up by more meritorious Brahmin candidates. This may be true so far as these two seats reserved for the Brahmins are concerned but this line of argument can have no force when we come to consider the seats reserved for candidates of other communities, for so far as those seats are concerned, the petitioners are denied admission into any of them not on any ground other than the sole ground of their being Brahmins and not being members of the community for whom those reservations have been made. The classification in the Communal G.O. proceeds on the basis of religion, race and caste. In our view, the classification made in the Communal G.O. is opposed to the Constitution and constitutes a clear violation of the fundamental rights guaranteed to the citizen under Article 29 (2). In this view of the matter, we do not find it necessary to consider the effect of Articles 14 or 15 on the specific Articles discussed above.

For the reasons stated above, we are of opinion that the Communal G.O. being inconsistent with the provisions of Article 29 (2) in Part III of the Constitution is void under Article 13. The result, therefore, is that these appeals stand dismissed with costs.

S.D.G.

Appeals dismissed.

CRIMINAL REVISION.

*Before The Hon'ble Sir Arthur Trevor Harries, Kt.,
Chief Justice.*

BHARADWAJ SINGH

v.

THE STATE.*

CRIMINAL.

1951.

May, 8.

Indian Penal Code (Act XLV of 1860), Section 411—Mere possession without proof of knowledge that the article is stolen—Nor any proof of reasonable belief of the same being stolen—conviction—If justifiable—Accused claiming property as his own—No case against him—Yet called upon to explain his possession and enter his defence—Defence disbelieved—conviction, if proper.

Where there is a *prima facie* case against him, the accused is called upon to offer an explanation. Where there is no case against him and yet he is called upon to enter upon his defence, the accused cannot be convicted merely because his statement and the evidence of his witnesses are disbelieved.

Petition by the accused against conviction and sentence under Section 411 of the Indian Penal Code.

The material facts will appear from the judgment.

Messrs. M. N. Banerjee and N. C. Talukdar for the Petitioner.

Mr. Kishore Mokerji for the Opposite Party.

The judgment of the Court was as follows—

Harries, C.J.:—This is a petition for revision of orders of the Courts below convicting the petitioner of an offence under section 411 of the Indian Penal Code and sentencing him to pay a fine of Rs. 200/- and in default of payment of the said fine to undergo rigorous imprisonment for three months.

The charge against the petitioner was that he was in possession of a cow knowing the same to be stolen or having

* Criminal Revision Case No. 300 of 1951 against the order of conviction and sentence passed by the Additional Sessions Judge of Alipore.

CRIMINAL

1951.

Bharadwaj Singh

The State.

Harries, C.J.

reasonable grounds for believing that the same was stolen. A learned Magistrate found him guilty and sentenced him as I have indicated. On appeal the conviction and sentence were affirmed by the learned Additional Sessions Judge of Alipore.

At the outset I should like to point out that if this man was guilty of receiving a stolen cow, then a fine of Rs. 200/- was quite inadequate. Life in villages in Bengal and elsewhere would become quite impossible if theft of cattle and the crime of receiving stolen cattle were dealt with leniently. Stealing a villager's cow is a very serious offence and so is being in possession of such cow knowing it to be stolen. But for the view I take on the question of guilt, I should have no hesitation in issuing a notice to enhance this sentence.

The case for the prosecution was that the cow in question belonged to the complainant Harimati Dasi. The cow was found to be missing about the end of February 1948 and on March 12, 1948 the complainant reported the matter to the Ekbalpore Police. About two months after she had given the Police information, her missing cow, it was said, was found in the possession of one Fouzdar Sardar. The complainant then filed a petition of complaint against Fouzdar Sardar and the cow was seized under a search warrant issued by a learned Magistrate against Fouzdar Sardar. Whilst the case was pending Fouzdar Sardar died and the person who was holding the cow was directed to make it over to the complainant. But he refused to do it and the cow was again seized under a search warrant.

The present petitioner Bharadwaj then filed a petition in the court of the Police Magistrate at Alipore claiming this cow as his own and stating that Fouzdar Sardar had been looking after the cow on his behalf. The petitioner claimed the cow and notice was issued upon the complainant who promptly retaliated by praying for process against Bharadwaj under section 411 of the Indian Penal Code.

Evidence was adduced before the learned Magistrate that the complainant's cow had strayed and that the cow eventually found in possession of Fouzdar Sardar was the complainant's cow. This evidence was hotly contested by the defence. But I shall assume that it was proved satisfactorily that the cow in the

possession of Fouzdar Sardar was the cow which had strayed from the complainant's premises about two or three months earlier.

CRIMINAL.

1951.

Bharadwaj Singh

v.

The State.

Harris, C.J.

It was argued in the lower courts that there was no evidence that this cow had been stolen. All the evidence amounts to is that it disappeared and of course it may have strayed. Taking possession however of a straying cow knowing it to be an animal which has strayed might well amount to theft, and I shall assume that this cow was stolen from the complainant by some one.

Being in possession of stolen property is in itself no offence. If it was, all of us I imagine would be in serious danger constantly. Any one in this court might buy an article to day quite openly and honestly and later find that that article had been stolen. If being in possession of stolen property was itself a crime then an innocent purchase of that sort would render the purchaser liable to conviction for a serious offence. Being in possession of stolen property is only crime if the person in possession either knows that the property is stolen property or has reasonable grounds for believing that the property had been stolen.

To succeed in a prosecution under section 411 of the Indian Penal Code the prosecution must not only prove that the property had been stolen, but they must also establish facts from which the court can properly infer that the person charged with being in possession of stolen property either knew the property to be stolen or had reasonable grounds for believing the same to have been stolen. Unless there is some *prima facie* evidence as to the knowledge of the accused then the latter is entitled to be acquitted, because as I have said, merely proving that he was in possession of the stolen property establishes no offence of any kind.

Assuming this cow was stolen and assuming that the cow in the petitioner's possession was identified satisfactorily as the complainant's cow, was there any evidence for the prosecution which would entitle the court to infer that the petitioner was in possession of the cow knowing the same to be stolen or having reasonable grounds for believing that the same was stolen?

CRIMINAL.

1951.

Bharadwaj Singh

v.

The State.

Harries, C.J.

Learned Advocates for the complainant has to concede that there was no evidence, but he urges that the courts were entitled to convict the petitioner because they disbelieved his explanation.

In cases of this kind the accused is only called upon to offer an explanation when there is a *prima facie* case against him. There was here no evidence at all as to his knowledge and therefore the accused should have been acquitted upon the evidence for the prosecution. Although there was no case against the accused, the accused was called upon to enter upon his defence and has been convicted merely because the statement of the accused and the evidence of his witnesses have been disbelieved.

I do not think it is necessary to point out that an accused can be convicted where there is no evidence against him merely because his evidence is disbelieved. If that were so, then countless people would be wrongly convicted merely on the ground that the court has disbelieved the usual defence, tendered, namely, of alibi. Assuming the whole of the evidence for the defence here was false, that would not entitle the court to hold that the petitioner had the requisite knowledge. If the evidence was false it had to be eliminated and it would have to be held that it in no way met the case for the prosecution. However, as I have pointed out the case for the prosecution failed to establish one of the essential elements, namely, the knowledge of state of mind of the accused and that being so the prosecution was bound to fail. The explanation given by the accused is only material when there is a case against him. It would be monstrous to hold that where there is no evidence against an accused the latter can be called upon to make his defence and then convicted because his defence is disbelieved. That is precisely what has happened in this case, and that being so the conviction and sentence cannot possibly be maintained.

In the result therefore this petition is allowed; the conviction and sentence are set aside and the accused is acquitted. If the fine or any part thereof has been paid it must be refunded forthwith.

S.D.G.

Rule made absolute.

ORIGINAL CIVIL.

Before The Hon'ble Mr. Justice H. K. Bose.

MONORANJAN ROY

v.

THE COLLECTOR OF CUSTOMS.*

CIVIL.

1951.

May, 8.

Writ of Mandamus—Article 226 of the Constitution of India—Section 45 of the Specific Relief Act—Jurisdiction of Court not as a Court of Appeal—Right of Appeal, if always an adequate remedy for refusing Prerogative Writs—Alternative remedy how far affects Courts' powers—Specific prayers—if essential.

In proceedings for Writs of Mandamus or Certiorari the Court does not constitute itself a Court of Appeal and cannot go into the merits of the conclusion of the inferior Court or Tribunal on the ground that it was erroneous.

Alternative remedies are factors which are taken into consideration in the exercise of court's discretion in the matter of issuing Prerogative Writs. Remedy by way of appeal in the present case under provisions of the Sea Customs Act held not to be an adequate remedy.

Although prayers should be specific but the Court has power to amend it at the hearing.

Charanjit Lal v. Union of India, A.I.R. (1951) S.C. 42 at p. 53 referred to.

Payment of money to Customs Officers are not payments to them within their individual capacities or official capacities and proceedings for recovery thereof do not lie against them. In any event the appropriate government must be made a party. Proceedings by way of Mandamus or Certiorari cannot be taken for recovery of money paid or realised as revenue. In *Re Nathan*, (1884) 12 Q.B.D. 461.

Mr. Niren De for the Petitioner.

Mr. A. K. Sen for the Respondent Collector of Customs.

The judgment of the court was as follows:—

* Matter No 85 of 1950; In the matter of an application under Article 226 of the Constitution of India and Section 45 of the Specific Relief Act.

CIVIL.

1951.

Mouoranjan Roy

v.

The Collector
of Customs.
(1951.)

Bose, J.

Bose, J.:—This is an application under Article 226 of the Constitution and Section 45 of the Specific Relief Act for an order on the Respondent to cancel or withdraw the order dated the 7th of August 1950 made by the respondent imposing a penalty of Rs. 3,300/- in respect of a consignment of goods imported by the petitioner without the requisite licence and also for an order for refund of the said sum of Rs. 3,300/- paid by the petitioner pursuant to the said order of the respondent.

The petitioner carries on business as dealer in paper of various kinds and is one of the largest importers of single faced corrugated paper in this country. The single faced corrugated paper is known in this country as also in the countries from which they are imported as "paper" as opposed to "board." Between May 1945 and June 1947 paper could be imported from the United Kingdom by importers of this country under Open General Licence No. VII and no restrictions were imposed by the Government upon the import of single faced corrugated paper from the United Kingdom. Since July 1947 the Government of India imposed vigorous restrictions on the import of paper from foreign countries including the United Kingdom and no paper could be imported without an import licence granted by the Government. Such restrictions continued till June 1948. Thereafter and until May 1949 paper could be imported in India from all Sterling and Soft Currency areas under Open General Licence No. XI. Between July and November 1948 the petitioner imported 2200 rolls of single faced corrugated paper from Czechoslovakia, Finland and United Kingdom and the petitioner was charged with duty payable for "Paper including Poster and Stereo and all coated papers except art paper, all sorts, not otherwise specified" as referred to under the then Customs Tariff Items No. 44. From May 1949 the Government of India again imposed restrictions on the import of paper including single faced corrugated paper and no merchant could import single faced corrugated paper without a licence from the Government. The Government, however, notified at the time that in case where traders of this country had already entered into firm contracts for the import of paper under Open General Licence No. XI they would be allowed to import such paper under a special licence to be granted by the Government. In or about April 1949 the petitioner placed orders with Thomson & Norris Manufacturing Co. Ltd. of

Middlesex in the United Kingdom for import of 1000 rolls of single faced corrugated paper of which 500 rolls arrived at the Calcutta Port in July 1949 and the remaining 500 rolls in October 1949. The petitioner duly applied to the Government for a special licence for the import of these 1000 rolls of paper and was granted a special licence No. 091546/48 C.C.I. dated the 30th July 1949. Upon the arrival of the said 1000 rolls of paper at the Calcutta Port the Customs authorities imposed a penalty of Rs. 2,900/- for each lot on the basis that they were not paper but came under the heading of "Paste Board, Mill Board, Card Board and Straw Board all sorts" as referred to under Customs Tariff Item No. 44 (4) and as the petitioner had not the necessary licence required for the import of such goods the Customs Authorities purported to act under Section 167 (8) of the Sea Customs Act. On the 20th December 1949 the petitioner appealed to the Central Board of Revenue from the said order of the Collector of Customs but the said appeal is still pending. Thereafter the petitioner obtained from the Government further licences for the import of "paper and other sorts" the last of such licences being No. 220699/48 C.C.I. dated 6th April 1950. By virtue of this licence No. 220699/48 the petitioner in April 1950 placed an order with Messrs. Donaldson & Filter Ltd. of Glasgow through the latter's local representative in Calcutta one Antoine Bentz of Stephen House, Calcutta, for the import of 340 rolls of single faced brown corrugated paper. The said goods arrived on or about 18th July 1950. Upon the arrival of the said goods the petitioner paid the ad-valorem duty of 37½% on the said goods, on or about 20th July 1950 and the Customs officers made the necessary endorsements on the licence of the plaintiff and on the relevant Bill of Entry. Thereafter on the 7th of August 1950 the Respondent imposed a penalty of Rs. 3,300/- on the said consignment in lieu of confiscation on the basis that the goods came within the description of Customs Tariff item No. 44(4). The Respondent acted under Section 167(8) of the Sea Customs Act.

CIVIL.

1951.

Monoranjan Roy

v.

The Collector
of Customs.

Bose, J.

On or about the 10th August 1950 the petitioner paid the said penalty of Rs. 3,300/- for getting the goods released. It is stated in the petition that it will appear from the correspondence that passed between the Import authorities and the said Antoine Bentz that single faced corrugated paper was always considered

CIVIL.

1951.

Monoranjan Roy

v.

The Collector
of Customs.

Bose, J.

in the past by the Customs authorities as "Paper" and not "Board." The petitioner charges the order dated the 7th of August 1950 as malafide, arbitrary and illegal and as an abuse of the statutory powers possessed by the Respondent Collector of Customs and his officers. It appears that the petitioner has obtained another licence No. 272312/48 C.C.I. dated the 4th of August 1950 for the import of paper and other sorts. It is alleged by the petitioner that the order of the Collector is an invasion upon his fundamental rights to acquire, hold and to dispose of property and to carry on his trade as importer of single faced corrugated paper under the said licences. The petitioner has been prevented from exercising his right to trade and utilise the said licences for the import of single faced corrugated paper.

In the circumstances the petitioner asks for the reliefs stated above.

Mr. C. T. Pillai the Assistant Collector of Customs has affirmed an affidavit. He states that each case of appraisement of the goods by the Customs Authorities is dependent on its own facts and any recognition or description in previous cases is irrelevant. The quality and character of the goods imported may be different in respect of different consignments imported.

The Customs authorities had in respect of two previous consignments of goods imported in 1949 adjudged a penalty of Rs. 2,900/- for each lot on the basis that the goods answered the description of "Paste Board, Mill Board, Card Board and Straw Board all sorts" as referred to in Customs Tariff Item No. 44 (4) and as the petitioner did not take out the requisite licence for importation of the goods, he was liable to pay the said penalty.

In spite of this warning the petitioner in April 1950 again placed orders for 340 rolls of corrugated brown paper and imported such goods without obtaining any special licence therefor.

Mr. Pillai states that if in the past any such goods were passed by the Customs authorities as "Paper not otherwise specified" it must have been done through mistake. In his opinion the correct classification is to place the goods in question

in the category of Customs Tariff Item No. 44 (4). The Customs Appraiser who directed 5% of the goods to be opened for appraisement and checking, decided after giving full consideration to the matter that the goods were assessable under Item No. 44 (4). The Collector of Customs has also agreed with the decision of the Appraising authorities. It is further stated that the opinion expressed by the Chief Controller of Imports in course of correspondence with Antoine Bentz is not conclusive and cannot be said to be binding on the Customs authorities.

CIVIL.

1951.

Monoranjan Roy

v.

The Collector
of Customs.

Bose, J.

In the 'Century' and Oxford Dictionaries "Board" is described as "a kind of thick stiff paper; a sheet formed by layers of paper pasted together." It appears to be by looking at and feeling the sample of goods annexed to the affidavit of Antoine Bentz affirmed on the 7th September 1950 that the goods in question cannot be considered with any definiteness or certainty as not falling within the description of goods as in Item 44 (4).

The Appraising authorities who guide or assist the Collector or Assistant Collector in the matter of appraisement have expressed the opinion that the goods fall within the description of Item no. 44 (4). The Assistant Collector or the Collector sees no reason to differ from them.

It appears that the Customs authorities have applied themselves to the consideration of the matter arising before them and they have arrived at a determination and adjudged the penalty.

I find it difficult to hold that the Customs authorities have acted in an arbitrary manner or have exceeded their jurisdiction.

It was contended at the hearing that the petitioner had not been given any opportunity to put forward his case or to make representations before the Customs authorities before the penalty was adjudged, and there has been violation of the principles of natural justice. No such case however is made in the petition or in any of the affidavits. There are no materials before me on affidavits to show that the decision as to the imposition of the penalty was arrived at without giving any opportunity to the petitioner to defend himself or to present his case.

CIVIL.

1951.

Monoranjan Roy

v.

The Collector
of Customs.

Bose, J.

It is clear law that in proceedings for Writs of Mandamus or Certiorari the Court does not constitute itself a Court of appeal and it cannot go into the merits of the conclusion of the inferior Court or Tribunal. The decision of the Customs authorities on the merits may be erroneous but this court cannot interfere on that ground.

It was contended by Mr. A. K. Sen that the prayers of the petition are not for a Writ of Certiorari as quashing of the proceedings has not been asked for. It is true that the prayers should be specific but it has been held by this court as also by the Supreme Court that the Court has power to amend the relief at the hearing. It may be noted that in the present case the petition has in prayer (c) asked for further or other directions which are wide enough to cover a relief in the nature of a Writ of Certiorari. In the case of *Charanjit Lal v. Union of India*, (1) Mukherjea J. of the Supreme Court observed as follows:

"Article 32 of the Constitution gives us very wide discretion in the matter of framing our Writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper Writ or direction has not been prayed for."

It was contended by Mr. Sen that the petitioner has alternative remedy by way of appeal under the Sea Customs Act and he has also a right of action under the general law and so he cannot be allowed to have recourse to the extraordinary Writs of Mandamus or Certiorari. Alternative remedies are factors which are taken into consideration in the exercise of the Court's discretion in the matter of issuing Prerogative Writs but I do not think that an appeal under the Act would in the circumstances of this case have been an adequate remedy. The petitioner has already filed an appeal under the Act in respect of a previous consignment of similar goods on or about the 20th December 1949 but the same has not yet been disposed of. I do not see any reason however why the petitioner could not file a suit and proceed expeditiously with it.

It was contended by Mr. Sen that the prayer for refund of the sum of Rs. 3,300/- cannot in any event succeed in this appli-

(1) A.I.R. (1951) S.C. at p. 53.

cation. I think the contention is sound. The money paid has gone into the Government exchequer and has become part of the general revenue or fund of the country. The Respondent cannot be called upon to pay the claim of the petitioner out of his own pocket. Action or proceedings should be taken against the Government for realisation of the money. The money deposited by way of penalty was not paid to the Customs authorities either in their official capacity or to them individually. It was paid to them merely as servants or agents of the Government. They have no right to hold it or to deal with it as against the orders of the Government. The appropriate Government is not a party to these proceedings. The prayer for refund of the money cannot in any event be acceded to in this application (1).

CIVIL.

1951.

Monoranjan Roy

v.

The Collector
of Customs.

Bose, J.

It was also contended that Section 198 of the Sea Customs Act is a bar to these proceedings as the requisite notice was not served on the Respondent. I have already expressed my view on the point in the case of Matter No. 113 of 1950 *Soorajmull Nagarmull v. The Assistant Collector of Customs* and others. Judgment is dated the 16th February 1951. Unless the acts complained of are outside the section and unless there is want or excess of jurisdiction the section operates as a bar.

In the result this petition fails and the Rule must be discharged with costs.

S.D.G.

Rule discharged.

(1) *In Re Nathan* (1884) 12 Q.B.D. 461.

ORIGINAL CIVIL.

Before Hon'ble Mr. Justice D. N. Sinha.

CIVIL. KRISHNA KISHORE GHOSH AND OTHERS

1951.

KISHORI DEBI KESHANI.*

April, 2.

Civil Procedure Code—Order VI Rule 17.—Amendment of pleadings—principles which may be followed.

The following principles may be evolved regarding the amendment of plaint.

(1) A Court exists for determination of the real controversy between the parties.

(2) In order to determine the real issue, the Court should be liberal in granting amendment of pleadings and such amendments will always be allowed except in the following cases:—

(a) Where the application is not bona fide, or where it is fraudulent and intended to over reach.

(b) Where it is made at a stage when it would cause injustice to the opposite party, which cannot be compensated by costs; or it would necessitate a de novo trial of the action.

(c) Where it would change a suit into a different kind of suit either be cause of a complete change in the subject matter of the action or of the legal relationship between the parties.

(d) Where the new cause of action is barred. But such an amendment may still be allowed if special circumstances exist.

(e) Where the whole of the plaintiff's case will be displaced by the proposed amendment.

(3) Where the subject matter of the suit is not altered the following amendments are permitted:—

(a) To modify the original cause of action or to recast the same to bring out the real dispute between the parties even if it alters to some extent the character of the suit; provided that the character is not altered as to change a suit of one kind into a suit of another description altogether.

(b) To add new cause of action.

* In the matter of Suit No. 646 of 1951.

(c) To alter reliefs or to add new ground for relief.

CIVIL.

(d) To add an alternative cause of action.

1951.

(4) All kinds of honest mistakes or blunderings may be rectified by amendment if it can be done without injustice to the opposite party.

Krishna Kishore
Ghosh

v.

(5) No injustice is ever done to the opposite party, if it can be sufficiently compensated by the panacea of costs. Where, however, the rights of innocent third party have intervened or the parties have changed their position or new rights have accrued, the payment of costs is not an adequate compensation.

Kishori Debi

Sinha, J.

(6) Where the above tests are satisfied, not only the Court has jurisdiction to allow an amendment but it is its duty to permit it. The Court must always avoid the multiplicity of legal proceedings. It is the duty of the Court to encourage the parties to bring before the Court their real dispute and to put an end to all questions that can arise in relation to the subject matter of the suit.

This application was made by the plaintiffs for amendment of the plaint.

Ajoy K. Basu, for the applicant.

A. K. Sen with S. Roy, for the respondent.

The material facts will appear from the judgment.

The following judgment was delivered:—

D. N. Sinha, J.:—This is an application for amendment of the plaint. The suit was filed in January last, and no written statement has yet been filed. The facts are briefly as follows. The plaintiffs are the owners and occupiers of a dwelling house, being premises No. 27 & 29 Baranoshi Ghosh Street. They were originally the owners of a contiguous piece of land, being premises No. 22B, Rajendra Mullick Street, which they sold out in 1937. The defendant is the present owner thereof. On that land, the defendant has already constructed a four-storied building, and the plaintiffs allege that she is proceeding to construct a fifth storey. The Corporation has sanctioned only a two-storied building and according to the plaintiffs, the foundation thereof is also that of a two-storied building. Premises No. 27 & 29, Baranoshi Ghosh Street is a house, constructed about half

CIVIL.

1951.

Krishna Kishore
Ghosh,

v.

Kishori Debi

Sinha, J.

a century ago. According to the plaintiffs, the result of all this has been that the western wall of the plaintiffs' house is tilting westward, large cracks have appeared in the walls and in the roofs and the defendant's house is also sinking and has caused disturbance in the neighbouring sub-soil. It is further alleged that there are ancient lights in the plaintiffs' premises, to the west, and the defendant has built a wall sixteen feet high, at a distance of two feet only from these ancient lights and is about to continue building the wall still higher. I need say nothing regarding the merits of the case here, since an application is pending for an injunction restraining the defendant from making any further construction, where these matters will be considered. In that application, the plaintiffs applied for and obtained an interim injunction restraining the defendant from making any further construction, not expressly authorised and sanctioned by the Corporation of Calcutta. At the hearing of the application however it transpired that the plaintiffs had pleaded most of the relevant facts in the body of the plaint but had omitted to incorporate a prayer for a perpetual injunction restraining the defendant from making any further constructions, apart from the wall, in respect of which only, an injunction had been prayed for. As the plaint stood, the plaintiffs could only ask for damages and an injunction regarding the wall. The result was that the interim injunction regarding further construction of the building was clearly bad, and I had to vacate it. The plaintiffs however asked for an opportunity to amend the plaint by incorporating a prayer for a perpetual injunction and I adjourned the main application for granting the plaintiffs and opportunity of making an application for amendment of the plaint, which they have now done. The amendments asked for are set out in red ink, in a draft, a copy whereof has been furnished to the defendant. The amendments asked for in Exhibit 'A' to the petition have been slightly varied. The only substantial alteration in the plaint is the addition of a prayer for a perpetual injunction restraining the defendant from further building, without sanction of the Corporation. It is argued that this is changing the nature of the whole suit and introducing a new and inconsistent case. Reliance is placed on section 54 of the Specific Relief Act which lays down that no injunction should be granted where damages are an adequate

remedy. It is argued that the plaintiffs themselves admitted in the original plaint that the injury was capable of being assessed in damages, thus disentitling them to an order for injunction. This to my mind is not a correct reading of the plaint. The plaintiffs state that as a result of the unlawful building by the defendant, their house has been damaged. The damages suffered so far, have been assessed, and it is said that the damages are continuing from day to day. It has nowhere been stated that the further constructions are also assessable in damages. It would be a strange kind of law which compels a man to look on helplessly while a neighbour goes on making unauthorised constructions, simply because, if his hearth and home cracks up and falls to the ground, a new one would be made again, by spending money. In such a case, pecuniary compensation is not an adequate remedy and I have no doubt in my mind that if the facts are proved, an injunction order would be quite appropriate. This however is in reality, an objection relating to the merits of the case. In this application, I am not concerned with the point as to whether the plaintiffs will succeed in obtaining an order for injunction. What I am concerned with, is, as to whether I should allow them an opportunity to ask for it. In my opinion the omission to ask for a perpetual injunction in this case, is a pure accidental error, or as the plaintiffs put it, "by mistake or oversight", and the amendment should be granted. I shall now discuss the law on the subject. Amendments of pleadings are governed by the provisions of Order 6 rule 17 of the Code of Civil Procedure which runs as follows:—

"R. 17: The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

This corresponds to section 53 of the old code. The provisions of section 53, were more restricted, both as to the point of time when the application could be made as well as to the extent of the amendment under the amended provision, a wide discretion is given to the court in the matter of amendment of pleadings. It is true that such discretion has to be exercised on

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

judicial principles and not in an arbitrary or fanciful manner so as to cause injustice to the other side, but it would be correct to say that, subject to such a limitation, the courts are gradually tending to become more and more liberal in granting amendments, especially when the application is made at an early stage and the other side can be adequately compensated by costs. Order 6 rule 17 of our Code is practically the same as the corresponding English rule, Order 21 rule 1 and it is instructive to refer to the leading cases on the subject.

In *Tildesley v. Harper* (1), Bramwell L. J. said as follows:—

"I have had much to do in Chambers with applications for leave to amend, and I may perhaps be allowed to say that this humble branch of learning is very familiar to me. My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala-fide, or that by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise."

In the same case, Thesiger L. J. said as follows:—

"I am also of opinion that it is important that the rules of the court as to pleading should be enforced, but this may be done at too great a price. The object of these rules is to obtain a correct issue between the parties and when an error has been made it is not intended that the party making the mistake should be mulcted in the loss of the trial."

In *Cropper v. Smith* (2), Bowen L. J. said as follows:—

"Now I think it is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights. Speaking for myself and in conformity with what I have heard laid down by the other division of the Court of Appeal and by myself as a member of it, I know of no kind of error or mistake which, if not fraudulent or intended to over-reach, the Court ought not to correct, if it

(1) (1878) 10 Ch. D. 393.

(2) (1884) 26 Ch. D. 700.

can be done without injustice to the other party. Courts do not exist for the sake of discipline but for the sake of deciding matters in controversy, and I do not regard such amendment as a matter of favour or of grace It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice as anything else in the case is a matter of right."

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

(Also See *Clarapede v. Commercial Union Association*, 32 W.R. 263, *Weldon v. Neale*, 19 Q.B.D. 396).

It has been the constant endeavour of the courts to allow parties every facility to put forward their real disputes. The Judicial Committee observed in *Hanooman Persaud v. Mussumat Babooee* (1), as follows:—

"It is of the utmost importance to the right administration of justice in these courts that it should be constantly borne in mind by them that by their very constitution they are to decide according to equity and good conscience; that the substance and merits of the case are to be kept constantly in view; that if by inadvertence or other cause, the recorded issues do not enable the court to try the whole case on the merits, an opportunity should be afforded by amendment, and if need be, by adjournment, for the decision of the real points in dispute."

It is argued in this case, that the amendment should not be allowed because it introduces a new case altogether and changes the nature of the cause of action. In the old section 53, it was expressly provided that an amendment should not be allowed so as to convert a suit of one character into a suit of another and inconsistent character. But this has been omitted from order 6 rule 17 of the present code. The result is, that there are now no rigid rules, to fetter the powers of the court in allowing amendments, and the matter is one of discretion entirely. This however does not necessarily mean that a party can be allowed to substitute one cause of action for another, nor change

(1) (1856) 6 Moore P.C. 410.

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

by amendment, the subject matter of the suit. Thus a suit based on contract cannot be allowed to be changed into a suit on tort, *Kasinth Das v. Sadasiv Patnaik* (1), or a suit upon one contract cannot be changed into a suit upon another contract. *Ma Shwe Mya v. Moung Mo Hnaung* (2), or a suit for specific performance into a suit for recovery of land *Clark v. Wray* (3), or a suit alleging one kind of legal relationship into a suit alleging a different kind *M. D. Iyengar v. G. R. Chetty* (4).

It is however the border line cases that give the most trouble and I confess that it is not always easy to reconcile the decisions on this subject. Alteration of the nature of a suit or the addition of a new cause of action might come dangerously near to an alteration of the subject matter. It must however depend upon the facts of each case. A workable test is to see whether the whole of the plaintiffs' case is displaced by the proposed amendment. If it does, such an amendment should not be allowed, if it does not, amendment should be allowed and the plaintiff should not be driven to a new suit. Multiplicity of actions is always discouraged by the courts. These principles will become clearer upon a delineation of the more important decided cases. In *Md. Zahoor Ali Khan v. Musst. Rutta Koer* (5), a suit was brought against a Ward of Court upon a bond. The suit proceeded on the footing that the plaintiff was entitled to proceed against the Ward's estate, and indeed, a number of transferees of the Ward's properties were impleaded upon the allegation that the transfers were collusive. The Judicial Committee held that the suit as framed was misconceived, but to force the plaintiff to a new suit would be to defeat his claim on the ground of limitation. Leave was granted to amend plaint by changing it into a pure money claim and by striking out the other parties.

In *Charan Das v. Amir Khan* (6), suits were brought for pre-emption, by asking for a declaration of the right but not possession. The Judicial Commissioner allowed an amendment by allowing the prayer for possession. Lord Buckmaster upholding the order for amendment said:

"If this be so, all that happened was that the plaintiffs through some clumsy blundering, attempted to assert rights

(1) 20 Cal. 805.

(4) A.I.R. 1938 Mad. 669.

(2) 48 I.A. 214.

(5) (1867) 11 M.I.A. 468.

(3) 31 C.D. 68.

(6) (1930) 48 Cal. 110 (P.C.).

that they undoubtedly possessed under the Statute, in a form which the statute did not permit That there was full power to make the amendment cannot be disputed and though such a power should not, as a rule, be exercised where its effect is to take away from defendant a legal right which has accrued to him by lapse of time, yet there are cases (11 Moore. I.A. 468) where such considerations are outweighed by the special circumstances of the case."

CIVIL.
—
1951.
—
Krishna Kishore
Ghosh
v.
Kishori Debi
—
Sinha, J.

In *Ma Shwe Mya v. Maung Mo Hnaung* (1), the plaintiff made a claim for specific performance of an agreement, said to have been entered into by the defendant in 1912, for transfer of certain lands for boring oil wells. At the trial, the plaintiff's case was dismissed on the ground that the alleged agreement was verbal. Upon appeal to the Judicial Commissioner, the plaintiff was allowed to amend by relying upon a prior agreement of 1903. The Judicial Committee held that such amendment could not be allowed. The plaintiff, basing his case on one agreement and failing therein, could not be permitted to succeed on a different agreement altogether, since it would be altering the real matter of controversy between the parties.

In *Ramsaran Mandas v. Mahabir Sahu* (2), the Karta of a Hindu family entered into an agreement with the plaintiffs for selling a certain house. The plaintiffs brought a suit against the Karta as also against the sons, grandsons, nephews etc. The suit was dismissed in the original court, and the plaintiff appealed. During the appeal, the Karta died. At the hearing of the appeal before the High Court, counsel for the appellant gave up the claim for specific performance but contended that the plaintiff was entitled to recover Rs. 9,000/- paid as earnest money. The High Court set aside the decree of the lower court and decreed Rs. 9,000/- with interest. Before the Privy Council, leave to amend was asked, in order to support the decree for the earnest money. Lord Sinha said as follows:—

"Their Lordships cannot accede to these arguments.

It is not permissible by amendment to change the nature of the suit as framed and even if it were, the defendants affected by such amendment must have an opportunity to rebut such new cause of action, a course which would in-

(1) (1921) 48 I.A. 214.

(2) (1926) 54 I.A. 55.

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

volve fresh written statements and a fresh trial. Their Lordships are unable to permit such a course, at this stage."

It should be noted that the Privy Council did not absolutely negative the right of the plaintiff to apply for such an amendment, but refused to sanction it at such a late stage.

In *Ardeshir Mana v. Flora Sasoon* (1), it was held by the Judicial Committee that a suit for specific performance or damages in the alternative can be amended so as to convert it into one for damages only. It was however stated that it would appear to be a wise precaution for a Judge before allowing any such amendment in a contested case to require the plaint to be actually remodelled in a form appropriate in actions seeking compensation for breach of contract and nothing else.

In *Kanda v. Waghu* (2), a suit was brought to set aside alienations by a widow, on the allegation that the properties were ancestral. Before the Judicial Committee, leave was asked to amend the plaint by stating that even if the properties were not ancestral, still the widow was incompetent to dispose of it. It was held that under section 153 and Order VI rule 17, it was not open to court to allow an amendment which altered the real matter of controversy between the parties.

In *Goppee Lall v. Must Chandrasolee* (3), a person left two widows with authority to adopt and both adopted. The plaintiff claimed through the second adopted son, but it was held that under Hindu law, a second adoption during the existence of a previously adopted son, was not allowed. The plaintiff then wanted to make a claim through the first adopted son, but this was not allowed as being entirely a new case.

In *Kasinath v. Sadasiv* (4), the plaintiff brought a suit for enforcement of a mortgage but omitted to ask for sale. The subordinate judge refused a prayer for amendment. Held in appeal that the view of the Subordinate Judge was wrong. The learned Judges said:—

(1) (1928) 55 I.A. 360.

(2) (1949) 77 I.A. 15.

(3) (1873) W.R. 12.

(4) (1893) 20 Cal. 805.

"The law prohibits any such amendment as would change the fundamental character of the suit; for example, a plaint cannot be so amended as to convert a claim based on contract into an action for tort. But an alteration in the relief does not alter the character of a suit."

CIVIL.

1951.

Krishna Kishore
Ghosh

v

Kishori Debi

—
Sinha, J.

In *Surendra Narain Singh v. Bhai Lal Thakur* (1), the plaintiff brought a suit for the rent of a 'Hat' which was dismissed. Later on, he wanted to amend by asking payment for use and occupation. This was refused as it would change the whole character of the suit, necessitating a new trial.

In *Saral Chand Mitter v. Mohun Bibi* (2), the plaintiff instituted a suit against the defendant upon a mortgage. The defence was that at the time the mortgage was executed, the defendant was a minor. The plaintiff thereupon prayed for an amendment by claiming in the alternative that if it was found that the defendant was a minor, he had induced the plaintiff to part with his money, upon the fraudulent representation of the defendant. Maclean, C.J., stated as follows:—

"It is urged by the appellant that the conversion of this suit from a suit to enforce a mortgage into a suit for the recovery of money paid upon the footing of a false representation, is the conversion of a suit of one character into a suit of another and inconsistent character. No doubt in one sense, the original character of the suit was to enforce the mortgage, but the object of the suit was, after all, to recover the money. We must read the proviso with other sections of the Code, and particularly with sections 42 and 45. * * * It seems to me that if the argument of the appellant were to prevail, it would virtually prevent an alternative case, which arises out of, and is immediately connected with, the same transaction from ever being raised in the same suit. I do not think, looking at the sections of the Code I have referred to, that that was the intention of the legislature, nor do I think that the alternative claim, which is set up is inconsistent with the character of the claim originally made within the meaning of the proviso in question. Reading section 42 and 45 of the Code, the intention of the legislature was that, as far as

(1) (1895) 22 Cal. 752.

(2) (1898) 25 Cal. 371.

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

possible, all matters in dispute between the parties, relating to the same transaction, should be disposed of in the same suit and I do not think that the proviso to Section 53 was intended to interfere with this. I, therefore, think that Mr. Justice Jenkins was perfectly right in allowing, in the manner he did, the amendment of the plaint."

In *Upendra Narain Roy v. Rai Janoki Nath Roy* (1), the plaintiff filed a mortgage suit but did not include a previous mortgage and further charge under the mistaken impression that the court had no jurisdiction. He then asked for an amendment to include the previous mortgage and further charge Woodroffe, J., states as follows:

"The Court being desirous of getting the true facts will allow an amendment subject to three general conditions: Bona fides on the part of the applicant possibly of amendment without such prejudice to the other party as cannot be compensated by costs (such as prejudice to rights accrued) and subject to this that the amendment is not such as to turn a suit of one character into a suit of another character. This statement is not made as being exhaustive but as embodying what are perhaps the three chief conditions on which amendment may be allowed. So it has been held that:—where a party who has an honest case has either through ignorance [See *Mokhoda Soondari v. Ram Churn* (2) and *Krishnaji v. Wamnaji* (3)], bona fide mistake, or some misapprehension, not placed the real facts before the Court [See *Bhyro Dutt v. Musst. Lekhmanee* (4) and *Lakshmi Bai v. Raoji* (5)] or has misconceived his cause of action and form of suit [*Ragho v. Vishnu* (6), *Shyamchand v. Land Mortgage Bank* (7) and *Krishnaji v. Sitaram* (8)] he should be allowed to amend, where this may be done without injustice to the defendant In short the object of a trial being to get at the rights of the parties, any amendment which may be required for that purpose should subject to the well known general principle governing this matter be allowed. It has been held that apart from the question of limitation it is unjust to a plaintiff to put him to the great expense of a new suit when a reason-

(1) (1917) 22 C.W.N. 611.

(2) 8 Cal. 871 (1882).

(3) 18 Bom. 144 (1894).

(4) 16 W.R. 123 (1871).

(5) 9 Bom. H.C.R. 1 (1872).

(6) 5 Bom. L.R. 329 (1903).

(7) 9 Cal. 695 (1883).

(8) 5 Bom. 496.

able amendment not inconsistent with his case as it originally stood might equally well answer his purpose as the new suit."

In *Sailesh Nath Bisi v. J. Chaudhuri* and others (1), the plaintiff filed a plaint under the Bengal Money Lenders' Act which did not disclose a cause of action. It was sought to amend the plaint by pleading the fact that on January 1st, 1939, proceedings in execution were pending. Such a fact would afford a cause of action. Held that no amendment can be made of a plaint which did not disclose a cause of action and the suit must be dismissed under Order 7 rule 11.

Civil.
—
1951.
—
Krishna Kishore
Ghosh
v.
Kishori Debi
—
Sinha, J.

In *Ahmed Hossain v. Must. Chembelli* (2), the suit was upon a dishonoured cheque. The plaint did not state that any notice of dishonour had been given, so that on the face of it, there was no cause of action. Held (dissenting from 50 C.W.N. 540) that an amendment ought to be allowed by permitting the plaintiff to plead notice of dishonour. Sarkar, J. said as follows:

"The making of amendments therefore are not really a matter of power of a court but its duty. It is a duty which has been cast upon courts so that substantial justice may be done, for which alone courts exist."

The position therefore shortly put, is that as a fundamental principle the law strongly favours an amendment where it is necessary in the ends of justice and it would require the clearest language to alter this very beneficial legal principle."

In *Someswar Bannérjee v. Union of India* (3), the plaintiff asked for a declaration that he was wrongfully dismissed from his office of Bridge Inspector in the Bengal Assam Railway and for damages and other reliefs. The Judicial Committee held in *High Commissioner for India v. Im Lall* (4), that the proper relief to ask for was a declaration that the dismissal was a nullity and the plaintiff continued in service. The plaintiff asked for amendment to bring his suit in line with the Privy Council decision. It was opposed on the ground that the alterations in the reliefs asked for, totally altered the nature of the suit, Bose J. said as follows:—

(1) (1945) 50 C.W.N. 540.

(2) (1945) 85 C.L.J. 213.

(3) (1950) 85 C.L.J. 364.

(4) 75 I.A. 225.

CIVIL.

1951.

Krishna Kishore
Ghosh

v.

Kishori Debi

Sinha, J.

"In my judgment to allow an amendment in the case now before me by substituting in the prayer portion of the plaint a declaration that the plaintiff is still in the employment of the defendant and he continues to hold his office as a Bridge Inspector in the said Railway will not tantamount to the institution of any fresh suit nor will it effect any alteration in the nature of the suit. The facts constituting the cause of action as stated in the body of the plaint remain unaffected."

In *Rajendra Nath Saha v. Sree Saraswati Press Ltd.* (1), the suit was for specific performance of an agreement with a claim for compensation in addition to or in substitution of the claim for specific performance. The application was for amendment by deleting the averment of readiness and willingness and to delete the claim for specific performance and to substitute a claim for damages simpliciter for breach of the agreement. The amendment was allowed.

It is sometimes seriously argued that an amendment should not be allowed, as it introduces a new cause of action. It is not an inflexible rule that a new cause of action should not be introduced. The old cause of action may be modified or a new cause of action added. Provided that the entire subject matter of the suit is not altered, such an amendment is permissible, *Gopal Krishnayya v. Ramaswami* (2). The adding of new reliefs is frequently the object of an amendment. As long as the new relief does not convert the suit into a suit of a different character, such new reliefs should be permitted, so as to avoid multiplicity of proceedings [see cases cited above; and *Kurup v. Raman* (3)]. New pleas may be added if left out through mistake or an error of judgment, *Tukaram v. Gobinda* (4). An alternative case is always allowed to be made and it is no objection that it is alternative to the cause of action already pleaded. Such an amendment should not be disallowed because the Court thinks that the alternative case is not likely to succeed, *S. Appa Rao v. Appa Rao* (5).

In *Sheonarayan v. Ramprasad* (6), a suit was brought on an adjusted partnership account. It was allowed to be amended

(1) (1950) 86 C.L.J. 186.

(5) A.I.R. 1927 Mad. 212.

(2) 122 I.C. 174.

(6) A.I.R. 1923 Nag. 241.

(3) 44 M.L.J. 515 = A.I.R. 1923 Mad. 553.

(4) A.I.R. 1926 Nag. 385.

to a suit for accounts of a dissolved partnership. Halifax A.J.C. said as follows:

"As has been shown, the amendment alters the character of the suit entirely and under section 53 of the old Code an amendment of that kind was expressly forbidden. But Section 153 and rule 17 of Order 6 of the present code make no express restriction on the discretion of the Court, and in this case it undoubtedly was judicially exercised

CIVIL.

1951.

Krishna Kishore
Ghosh
v.

Kishori Debi

Sinha, J.

In *Sultan v. Esuf* (1), a suit was brought for partition on the basis of the plaintiff's exclusive ownership. By amendment, the suit was allowed to be changed into a suit for partition based on co-ownership. A modification of the original relief may be allowed *Bhewanlal v. Sumranlal* (2).

In *Noor Muhammad v. Natwar Lal* (3), the suit was on an alleged agreement for a lease. The question arose whether the agreement was with the plaintiff or his father. The plaintiff applied for an amendment by adding his father as a party but it was refused. On appeal it was held that an amendment should have been allowed. It was the manifest duty of a Judge to try and put an end once for all to all questions that can arise in relation to a particular transaction. Where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice nor takes by surprise the opposite party, the Judge should allow such amendments.

The technical rules governing the framing of pleadings are not intended to deprive a litigant of his remedy but to serve the ends of justice. A plaint should be allowed to be corrected so as to bring the parties face to face and allow determination on the merits of the real point at issue, *Mohanlal Ramgopal v. Firm Udai Ram* (4). From the decided cases the following principles may be evolved:—

(1) A court exists for determination of the real controversy between the parties.

(2) In order to determine the real issues, the court should be liberal in granting amendments of pleadings.

(1) A.I.R. 1925 Mad. 909.

(3) (1919) 45 All. 220

(2) A.I.R., 1927 Nag. 310.

(4) A.I.R. 1936 Pat. 140.

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

(3) Such amendments will always be allowed except in the following cases:

(a) where the application is not bonafide, or where it is fraudulent and intended to overreach.

(b) where it is made at a stage when it would cause injustice to the opposite party, which cannot be compensated by costs, or where it would necessitate a *denovo* trial of the action;

(c) where it would change the suit into a different kind of a suit, either because of a complete change in the subject matter of the action or of the legal relationship between the parties;

(d) where the new cause of action is barred. But such an amendment may still be allowed if special circumstances exist;

(e) where the whole of the plaintiff's case will be displaced by the proposed amendment;

(4) Where the subject matter of the suit is not altered, the following things are permitted by way of amendment:

(a) To modify the original cause of action or to recast the same to bring out the real dispute between the parties even if it alters to some extent the character of the suit; provided that the character is not so altered as to change a suit of one kind into a suit of another description altogether.

(b) To add a new cause of action.

(c) To alter the reliefs or add a new ground for relief.

(d) To add an alternative cause of action.

- (5) All kinds of honest mistake or blunderings may be rectified by amendment if it can be done without injustice to the opposite party. If a person misconceives his case, he should be allowed to put it right. But a plaintiff who is unsuccessful in the case originally put forward cannot then change his front and seek to be successful on another and a completely different ground.

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

- (6) No injustice is ever done to the opposite party if it can be sufficiently compensated by the panacea of costs. Where, however, the rights of innocent third parties have intervened, or the parties have changed their position or new rights have accrued, the payment of costs is not an adequate compensation.

- (7) Where the above tests are satisfied, not only the court has jurisdiction to allow an amendment, but it is its duty to permit it. The court must always avoid a multiplicity of legal proceedings. It is the duty of the court to encourage the parties to bring before the court their real disputes, and put an end once for all to all questions that can arise in relation to the subject matter of the suit.

Applying the above principles to the facts of this case, what do we find? The subject matter of the suit is the new construction which is being built by the defendant on her land. All the disputes between the parties in respect of the said construction should be brought before the Court and decided. The construction of the wall is only a part of the dispute. The facts stated in the plaint clearly shows that the plaintiffs intended to ask for relief in respect of the continuance of the construction. In paragraph 12 of the plaint it is stated that the defendant proposed to carry on her construction further, as the protruding steel stanchions show. I am therefore quite inclined to believe that the omission to ask for an injunction to restrain further construction, was a pure mistake. That this is so is further demonstrated by the fact that the plaintiffs after filing the suit made an application to restrain, not only the construction of the

CIVIL.

1951.

Krishna Kishore

Ghosh

v.

Kishori Debi

Sinha, J.

wall but of the building itself. The suit itself has just been filed and even the time for filing written statement has not arrived. At this early stage of the proceedings, no prejudice will be suffered by the defendant if the proposed amendment is allowed. Not to allow the amendment will merely mean that the plaintiffs would have to file another suit in respect of the construction of the building. Therefore, I have not only the jurisdiction to allow the amendment, but under the circumstances it is my duty to do so.

There will, therefore, be an order in terms of clause 1, 2 and 3 of the summons with this variation that the amendments will be as shown, not in Ex. "A" to the petition but in the final draft filed, a copy whereof has been supplied to the otherside, and which I direct should be marked as Ex. 'B'. The plaintiffs will not only pay the cost of today, but of the day upon which it was heard and adjourned, because the amendments in Ex. 'A' were not quite satisfactory. Certified for counsel.

Mitter & Boral, Solicitor for the Applicant.

Sudhir Chandra Roy Chowdhury, Solicitor for the Respondent.

S.K.R.C.

Amendment allowed.

CIVIL.

CIVIL REVISION.

1951.

April, 2.

Before the Hon'ble Mr. Justice R. P. Mookerjee and the Hon'ble Mr. Justice B. K. Guha.

PROTAP KUMAR SEN AND ANOTHER

v.

NAGENDRA NATH MAZUMDAR.*

The Indian Independence (Legal Proceedings) Order 1947—Section 4(r)—orders in proceedings pending on the appointed day—forwarding certificate of non satisfaction to Alipore Court by the Jessore Court—if competent to be given effect to—effect of repeal of the Indian Independence Act by Article 395 of the Constitution of India.

* Civil Revision Case No. 697 of 1950 against order dated 22-5-1950 of the Court of the District Judge at Alipore (24 Parganas).

Constitution of India—Article 395—effect of repeal of the Indian Independence Act—if affects rights already accrued—If such rights saved under Article 367 of the Constitution which attracts section 6 of the Indian General Clauses Act (X of 1897).

CIVIL.

1951.

Protap Kumar

v.

Nagendra Nath

Mookerjee, J.

A suit was filed in Jessore on 30-5-1947 in which attachment before judgment was effected on 28-6-1947 of properties within 24 Parganas. The suit was decreed ex-parte on 9-12-1948. A certificate of non-satisfaction was issued by Jessore Court on 18-8-1949 which was directed to return as incapable of execution.

Held—Jessore Court continued, even after the appointed day, to have, for the purposes of the proceedings which were pending before that Court, all the jurisdiction and powers which it had immediately before the appointed day by virtue of section 4 sub-clauses (1) and (3).

Dominion of India v. Hirālāl Bāthra (1), distinguished.

Sushama Roy v. A. S. M. Osman (2), distinguished.

Repeal of the Indian Independence Act 1947 by Article 395 of the Constitution does not affect the rights already accrued by virtue of Section 6 of the Indian General Clauses Act 1897 which is attached by Article 367 of the Constitution.

Madan Gopal v. Province of West Bengal (3), referred to.

Panchanan Pak and Murari Mohan Mitra, for the Petitioner.

Chandra Sekhar Sen and Jageswar Majumdar, for the State.

No one for the Opposite Party.

The material facts will appear from the judgment.

The judgment of the Court was as follows:—

Mookerjee, J.—On the 30th May, 1947, the plaintiffs petitioners filed a suit in the Court of the Subordinate Judge at Jessore, then a part of undivided Bengal. In pursuance of an order passed by the Subordinate Judge certain properties, belong-

(1) 53 C.W.N. 817.

(2) 54 C.W.N. 491.

(3) 54 C.W.N. 807.

CIVIL.

1951.

Protap Kumar

Sen

v.

Nagendra Nath

Mookerjee, J.

ing to the defendant situate within the district of 24-parganas, were on the 28th June 1947, attached before judgment through the District Judge at Alipore. When the suit was so pending in the Jessore Court, under the Indian Independence Act, 1947 (10 & 11 Geo. VI C. 30) two new Dominions came into existence with effect from the 15th August, 1947 and among others the then Province of Bengal was partitioned between the two said Dominions, India and Pakistan.

The suit which was pending in the Jessore Court was decreed ex-parte on the 9th December, 1948. On the 3rd August, 1949, the plaintiffs decree-holders applied before the Subordinate Judge at Jessore, then situate within the Dominion of Pakistan, for a certificate of nonsatisfaction under Order XXI, rule 6 of the Code of Civil Procedure. The certificate of non-satisfaction was accordingly issued on the 18th August, 1949, and was received by the District Judge of Alipore, within the district of 24-Parganas, West Bengal, situate within the Dominion of India. On the 22nd May, 1950, the District Judge of Alipore directed the return of the certificate of non-satisfaction to the Court of the Subordinate Judge at Jessore inasmuch as the decree passed by the Jessore Court was not capable of execution by the Alipore Court in another Dominion. It is against this order that the plaintiffs have obtained the present Rule.

In spite of service of notice being effected on the judgment-debtor opposite party on two occasions, no appearance has been entered in this Court on behalf of the opposite party. Notice having been issued on the Advocate General of West Bengal under Rule 1 of Order XXVIA of the Code of Civil Procedure, we have had the advantage of hearing the Government Pleaders.

Although the learned District Judge has referred to *Dominion of India v. Hiralal Bathra* (1), and *Sushama Roy v. A. S. M. Osman* (2), it need only be pointed out that in both those cases the decrees in question had been passed before the 15th August, 1947. In the present case, on the other hand, the suit was pending on the 15th August, 1947, and we are required to consider the effect of the provisions contained in the Legal Proceedings Order 1947, issued by the Governor-General under

(1) 53 C.W.N. 817.

(2) 54 C.W.N. 491.

section 9, of the Indian Independence Act, 1947. Under Clause 4 of the Legal Proceedings Order—

CIVIL.

1951.

“Notwithstanding the creation of certain new Provinces and the transfer of certain territories from the Province of Assam to the Province of East Bengal by the Indian Independence Act, 1947—

Protap Kumari

v.

Nagendra Nath

Mookerjee, J.

(1) all proceedings pending immediately before the appointed day in any Civil or Criminal Court other than a High Court) in the Province of Bengal, Punjab or Assam shall be continued in that Court as if the said Act had not been passed and that Court shall continue to have for the purpose of the said proceedings all the jurisdiction and power which it had immediately before the appointed day.

.....; and

(3) effect shall be given within the territories of either of the two Dominions to any judgment, decree, order or sentence of any such Court in the said proceedings as if it had been passed by a Court of competent jurisdiction within that Dominion.”

Applying these relevant provisions to the facts of the present case it must be held that the Jessore Court continued even after the appointed day to have, for the purposes of the proceedings which were pending before that Court immediately before that day, “all the jurisdiction and powers which it had immediately before the appointed day.” Before the said appointed day, the Jessore Court had jurisdiction to forward a certificate of non-satisfaction to any other Court within the then Province of Bengal. In respect of the suit which was pending on the appointed day in the Jessore Court, the latter would be treated as if there had been no partition of Bengal, and the district of Jessore had not become a part of a separate independent Dominion.

Apart from the effect of sub-clause (1) of Clause 4 of the Legal Proceedings Order referred to above, sub-clause (3) of the same clause makes a further provision the effect of which may

CIVIL.

1951.

Protap Kumar

Sen

v.

Nagendra Nath

Mookerjee, J.

also be considered. In respect of a suit or proceeding which was pending immediately before the appointed day in a particular Court, the decree that may be passed by that Court in respect of that suit or proceeding will be given effect to within the territories of either of the two Dominions on the footing that such a decree had been passed by a Court of competent jurisdiction within that Dominion. Under the provisions contained in subclause (3) of Clause 4 of the Legal Proceedings Order, therefore, the decree passed by the Jessore Court after the appointed day, in a suit or proceeding which had been pending immediately before the said appointed day, will be treated to be one by a Court of competent jurisdiction within the Indian Dominion, although Jessore was not after the said appointed day a part of the Indian Dominion. If the Jessore Court is to be deemed to be a Court within the Indian Dominion, as it must be in respect of a suit pending immediately before the appointed day, there is no handicap on the Jessore Court transmitting a certificate of non-satisfaction to the Court of the District Judge at Alipore. For the purposes of this suit, the two Courts at Jessore and at Alipore have to be treated as being within the same Dominion.

Further, the Alipore Court within the Indian Dominion is to give effect to the decree passed by the Jessore Court, though outside the said Dominion, in a suit which was pending in the latter Court immediately before the appointed day, in the same manner as in the case of a decree passed by another Court within the Indian Dominion.

In this view, it must be held that the transmission of the certificate of non-satisfaction by the Jessore Court to the Court of the District Judge at Alipore was legal and Valid. We have next to consider the effect of the promulgation of the Indian Constitution. Under Article 395 of the Constitution the Indian Independence Act was repealed. If the Indian Independence Act be not now in force, it is contended that the orders passed by the Governor General under section 9 of the said Act would also become inoperative. Even if under the Legal Proceedings Order, 1947, referred to above, the transmission of the certificate of non-satisfaction by the Jessore Court to the District Judge at Alipore were valid, can the Alipore Court, on the basis of

such a certificate, when the Constitution of India is now in force, put the same into execution? The effect of the repeal, as contained in Article 395 of the Constitution, is not to affect the rights and liabilities already accrued under the Indian Independence Act, and the orders passed by the Governor-General thereunder. Section 6 of the Indian General Clauses Act (X of 1897) which is attracted under Article 367 of the Constitution provides that the repeal of the Act will not affect the rights and liabilities which had accrued already. [See in this connection *Madan Gopal v. Province of West Bengal* (1)]. The right which the decreeholders had got under the Governor-General's Order has not been affected by the subsequent repeal of the Indian Independence Act.

CIVIL.

1951.

Protap Kumar

v.

Nagendra Nath

Mookerjee, J.

The result, therefore, is that this Rule is made absolute. The order passed by the District Judge of 24-Parganas directing the return of the certificate of non-satisfaction to the Jessore Court is set aside, and further proceedings in execution will proceed according to law.

As there has been no appearance on behalf of the opposite party, there will be no order for costs in this Court.

Cuha, J.:—I agree.

S.D.G.

Rule made absolute.

(1) 54 C.W.N. 807.

CIVIL.

SUPREME COURT.

1950.

May, 5.

Present:—*The Hon'ble Sri Harilal J. Kania, Chief Justice,*
The Hon'ble Mr. Justice M. Patanjali Sastri and The
Hon'ble Mr. Justice S. R. Das.

CHITTARANJAN MUKHERJI

v.

BARHOO MAHTO.*

Letters Patent, Clause 12—leave under—application for revocation of leave
—revocation when not justified.

Upon an allegation that a partnership was entered into orally in January 1944 which was confirmed by a letter of 14th December 1944 addressed to the Plaintiff at Calcutta a suit for declaration that the partnership has been dissolved was instituted in the original side of the Calcutta High Court on 17th February 1947 with leave of the Court under Clause 12 of the Letters Patent. On 2nd May 1947 the defendant filed application for revocation of leave on the ground that no part of the cause of action arose in Calcutta. The application was dismissed at the first instance but allowed in appeal.

Held—Having entered appearance on 11th March 1947 the defendant respondent, far from complaining against leave, which he should have done at the earliest opportunity, availed himself of the pending suit to have advantage for himself by consent orders in interlocutory proceedings. The proceeding having reached such a stage, it will be grave injustice to revoke the leave.

N. C. Chatterjee, Senior Advocate, and *Sri Narain Andley*, Advocate for the Appellants.

G. S. Pathak, Senior Advocate, and *H. J. Umrigar*, Advocate for the respondent.

The relevant facts will appear from the judgment.

The judgment of the Court was as follows:—

Patanjali Sastri, J.:—This appeal arises out of an application for revocation of the leave obtained by the appellant for

* Civil Appeal No. 64 of 1949 against the judgment and order passed in Appeal from Original Order No. 61 of 1947.

the institution of a suit on the original side of the Court at Calcutta for a declaration that a partnership entered into by him with the respondent has been dissolved, in the alternative, for a dissolution of the partnership and for accounts and other consequential reliefs.

CIVIL.

1950.

Chittaranjan
Mukherji

v.

Barhoo Mahto

Patanjali Sastri, J.

It was alleged in the plaint that the partnership was entered into orally at Calcutta in or about January 1944 on certain terms which were subsequently confirmed by the respondent on 14th December 1944 by a letter addressed to the appellant in Calcutta. The suit was instituted on 17th February 1947. On 3rd March 1947 the appellant applied for a temporary injunction restraining the respondent from realising or withdrawing moneys due in respect of contracts alleged to have been undertaken on behalf of the partnership and for the appointment of a receiver to take charge of the entire partnership assets. The respondent entered appearance on the 11th March, 1947, and with his consent an order was passed by Ormond J. appointing two joint receivers to collect Rs. 21,000/- admittedly due to the partnership from the Garrison Engineer, Eastern Command, Tollygunge, pending final disposal of the appellant's application for injunction and receiver, which was dismissed on 25th April 1947, subject, however, to the direction that the joint Receivers for the sum of Rs. 21,000/- should continue and also take charge of all the books of account of the partnership business. On 16th April 1947 the respondent applied for and obtained extension of time to file his written statement which was actually filed on 29th April 1947. The respondent therein pleaded, *inter alia*, that the partnership in question related solely to the military contracts undertaken by the respondent and did not comprise the other contracts undertaken by him, and that, if accounts were taken of the military contracts, the appellant, who had withdrawn large amounts from the partnership funds, would be found liable to pay substantial amounts to the respondent. The respondent denied the genuineness of the letter of 14th December 1944 relied on by the appellant as showing that the partnership related to all the contracts undertaken by the respondent, and put forward a deed of partnership dated 3rd April 1946 as embodying the terms of the partnership which, according to him, was constituted on 1st November 1943. He alleged that the agreement of partnership was entered into and the deed of

CIVIL.

1950.

Chittaranjan
Mukherji

v.

Barhoo Mahto

Patanjali Sastri, J.

partnership executed in Bihar. The Court had no jurisdiction to entertain the suit as no part of the cause of action arose in Calcutta and the leave obtained on false allegations should be revoked.

The present application for revocation of leave was filed by the respondent on 2nd May 1947. The appellant contended *inter alia*, that the application for revocation was inspired by the observations made by Clough J. in his judgment dismissing the appellant's application for appointment of a receiver to the effect that he was not satisfied as to the bona fides of the appellant in filing the suit in Calcutta. Referring to this contention the same learned Judge, who happened to hear the application, said that he made those observations without due appreciation of the matter, and that it was "impossible in view of the appellant's assertion that he now ordinarily resides in Calcutta and that the agreement was made in Calcutta to find as a fact that Calcutta is not a convenient forum so far as he is concerned. If it is convenient for him, it is not possible to say that it is established that he has acted mala fide simply to harass the defendant." On the question of balance of convenience, the learned Judge held, on a consideration of all the circumstances of the case, that he did not think "it is possible to say that the balance of convenience is so against the suit being brought in Calcutta that the leave granted should be revoked on that ground." He was also of opinion that, having regard to the conduct of the respondent in "making use of the existence of the suit to obtain or rather to consent to an order which he thought would be to his own advantage", and in allowing the proceedings to continue involving expenses which could have been avoided if their stay had been applied for, "it was altogether too late to make an order for revocation even if I thought it was otherwise a proper order to make in this case."

From that order the present respondent preferred an appeal on 21st August 1947 and on the same day he applied for a stay of proceedings in the suit till the disposal of the appeal. Such stay was granted on 18th December 1947. The appeal was heard by the Chief Justice and Mukherjee J. who set aside the judgment of Clough J. and directed that the leave granted under Clause 12 of the Letters Patent be revoked, that the plaint

filed in the appellant's suit "be taken off the file" and that the appellant be at liberty institute a fresh suit in the court of appropriate jurisdiction in the State of Bihar on the same cause of action. The Learned Judges went, in some detail into the question of balance of convenience, and came to the conclusion that *prima facie* it would be more convenient to have the suit tried by any Court in Bihar, and so far as the respondent was concerned it would be harassing and vexatious if the suit was tried on the original side of the Court. There was no "substances", in their view, in the contentions based on the respondent's delay in applying for revocation and his acquiescence in the proceedings.

CIVIL.

1950.

Chittaranjan
Mukherji

v.

Barhoo Mahto

Patanjali Sastri J.

Learned counsel for the appellant challenged the correctness of this conclusion, pointing out that the view of the learned Judges of the appellate Bench that, if the suit was tried in Bihar "it would not be at all necessary to call any evidence for the purpose of proving where the contract was in fact entered into and that there may not be necessity for calling any of the handwriting experts" was based on a misapprehension of the true position, inasmuch as it was necessary for the appellant to prove the oral contract which, according to him, was entered into in Calcutta, and for proving that contract he had to summon witnesses in Calcutta irrespectively of where the suit was tried. Similarly, it was necessary for the appellant to call the handwriting experts in any case to prove the respondent's signature on the letter of 14th December 1944, whose genuineness was denied, as the letter was an important piece of evidence for the appellant to establish the true scope of the partnership which was seriously disputed. Counsel also complained that the learned Judges over-looked that, according to the respondent's own allegations in his application, much of his evidence would have to be taken on commission as he proposed to examine Railway and Military Officers to prove that he was not in Calcutta either in January 1944 or in December 1944, and "most of the said officers are now posted outside Bihar." The conclusion therefore that the balance of convenience was in favour of a trial in Bihar was, it was said, erroneous. The criticism is not without force as the judgment under appeal does not advert to these aspects of the matter. We consider it, however, unnecessary in this case to enter upon a discussion of the balance of convenience,

CIVIL.

1950.

Chittaranjan

Mukherji

v.

Barhoo Mahto

Patanjali Sastri, J.

We hold that, having regard to the delay in filing the application for revocation and the respondent's conduct in relation to the proceedings in the suit, the leave originally granted should not be revoked.

As already stated, the suit was instituted on 17th February 1947 and the respondent entered appearance on 11th March 1947. So far from complaining that leave had been improperly granted to file the suit in Calcutta, as he should have done at the earliest possible opportunity, and asking for all proceedings to be stayed until that question was settled, the respondent availed himself of the pending suit to have a consent order passed by the Court appointing the solicitors of the parties as joint receivers to collect and hold the sum of Rs. 21,000/- due from the military authorities at Tollygunge. That was because, as admitted, it was necessary to recover that sum immediately as "the Department of the Garrison Engineer, Eastern Command, Tollygunge, was going to be abolished as and from the 31st March 1947." Having secured this advantage, he contested the appellant's application for injunction and receiver in other respects and got it dismissed on 25th April 1947. This proceeding would not have gone on and the appellant would not have had to incur the incidental expenses if the application for revocation had been filed and all proceedings stayed soon after the respondent entered appearance on the 11th March. Indeed, there is considerable force in the suggestion that the application for revocation was an after-thought inspired by the observation of Clough J. in his order dated 25th April 1947 to the effect that, as both the parties were residents of Muzaffarpore in Bihar, the suit was filed in Calcutta with a view to harass the respondent. As already stated, the learned Judge himself explained later, in his order refusing revocation, that his previous observation was based upon a misapprehension as he did not appreciate that the appellant had alleged in his plaint that he was residing in Calcutta and that the letter of December 1944 was actually delivered to him at Calcutta. Even when the respondent filed the application for revocation on 2nd May 1947, he made no attempt to get the further proceedings in the suit stayed. On the contrary, he himself applied for discovery and inspection of the plaintiff's documents on 2nd July 1947 and obtained an order on 7th July, the appellant having a few days before got a similar order in respect of the respondent's documents. And it

was not until the inspection of the documents was nearing completion that the respondent appealed on 21st August 1947 against the order of Clough J. rejecting the application for revocation, and got further proceedings stayed in December 1947.

CIVIL.

1950.

Chittaranjan

Mukherji

v.

Barhoo Mahto

It is thus clear that the respondent has not only acquiesced in the steps taken by the appellant to carry forward the progress of the suit incurring considerable expenses but, in the language of Clough J. "made use of the existence of the suit" to obtain such interlocutory reliefs as he thought would be to his own advantage, at the hands of the court which he now claims should not try the suit. We are of opinion, in agreement with Clough J., that the proceedings in the suit have been allowed to reach a stage where it would result in grave injustice if the court were to hold that the forum convenient was Bihar and not Calcutta and revoke the leave on that ground.

The appeal is therefore allowed and the respondent's application for revocation of leave is dismissed with costs throughout.

S.D.G.

Appeal allowed.

CIVIL REVISION

Before the Hon'ble Mr. Justice Roxburgh.

DHARAMSI LILADHAR VORA

v.

UNION OF INDIA.*

Notice of Suit—Section 77 of the Indian Railways Act and section 80 of the Civil Procedure Code—One notice satisfying requirements of both sections—valid.

It is not essential that notices under section 77 of the Railways Act and under section 80 of the Civil Procedure Code must be written on separate pieces of paper.

* Civil Revision Case No. 1928 of 1950 against the judgment of the Full Bench of the Small Causes Court, Calcutta dated 26-7-1950 in Suit No. 1092 of 1949.

Radha Shyam Basak v. Secretary of State for India (1), followed.

(1) 44 Cal. 16.

CIVIL.

Nilkantha Chatterji for the Petitioner.

1951.

Ajay Kumar Basu for the Opposite Party.

May, 2.

Dharamsi Lila-
dhar Vora

The material facts will appear from the judgment.

v.

Union of India.

The judgment of the Court was as follows:—

Roxburgh, J.:—This is a Rule against an order of the Full Bench of the Calcutta Court of Small Causes, upholding a decree of the trial Judge dismissing the plaintiff's suit. The plaintiff's suit was filed on December 21, 1948, against the Governor-General of the Dominion of India. His claim is in respect of loss, non-delivery or destruction of two consignments valued at Rs. 187/8/-. The goods were despatched from a station on the Bombay Baroda and Central Indian Railway to Calcutta to be delivered by the Bengal Nagpur Railway.

Both the lower courts have dismissed the suit on the ground that no notice under section 80 of the Code of Civil Procedure has been served. The only notices proved are Ex. 4 copy of notices sent by registered post to the General Manager of each of the two Railways, dated July 21, 1948, with the accompanying acknowledgment due from the General Manager of each Railway. Besides these notices another notice was sent on August 12, 1948, addressed to the Governor-General of India in Council, through the Secretary to the Government of India, Railway Department (Railway Board), New Delhi. In the trial Court, the last notice was referred to as a notice under section 80, and the others as notices under section 77 of the Indian Railways Act. The former has been rejected as not being a valid notice under section 80, on the ground that it was sent to the Governor-General through the Secretary to the Government of India in New Delhi, whereas under section 80, as it stood at the date when the notice was sent, the notice was required to be delivered to the General Manager of each Railways. In the trial court it was urged that the other notice which was served on both the General Managers could be accepted, both as a notice under section 77 of the Railways Act, as well as a notice under section 80 of the Code of Civil Procedure. So far as the question of limitation is concerned the notice was timely under both the

sections. In other words, it was served within six months of the date when the goods could have been expected to be delivered, and was thus within time under section 77; and the suit was brought on December 21, 1948, well over two months after the notices were served.

CIVIL.

1951.

Dharamsi Lila-
dhar Vora

Union of India.

Roxburgh, J.

The lower courts have not accepted the contention that this notice can be accepted both as a notice under section 80, and also as a notice under section 77 of the Railways Act. Even as a notice under section 77, it is open to comment, in that the wording of the notice is to the effect that it appears to make a reference to some previous notice under section 77. It runs:

"We hereby beg to draw your attention to the notice under section 77 of the Indian Railways Act of the loss, non-delivery and destruction of the above consignment putting us to loss and damages amounting to Rs. 187/8/- altogether." Details of the railway receipts and the stations are given above at the heading of the notice. However, it seems to me that the courts are right in holding that the paper does comply with all the requirements of section 77 of the Railways Act, giving notice of the claim and being made within six months of the operative date.

The question then is whether the same notice also complies with the requirement of section 80. The notice specifically goes on to say—"Please take particular notice that unless the said goods or the value thereof is delivered or paid to us within 7 days from the receipt of this notice we shall legal proceedings without further reference and hold you liable for the abovementioned amount plus all charges on it" (the carbon copy is not clearly legible in part).

Now this notice includes, in my opinion, all the elements required by section 80 of the Civil Procedure Code. The cause of action is clearly stated. The name and address of the plaintiff is stated and intimation is given that a suit will be filed. The Full Bench has rejected the paper on the ground that the name and address of the plaintiff is not given. The record shows that, in fact, the Bengal Nagpur Railway replied to the notice in question on January, 28, referring specifically to the letter

CIVIL

1951

1951

Dharamsi Lila-
dhar Vora

Union of India

Roxburgh, J.

dated July 21, and giving the various particulars contained therein, incidentally stating that the goods were at Howrah lying undelivered. Only the plaintiff's carbon copy of the document in question is proved, this contains the name of the plaintiff's firm and address. The Railways have not produced their copies.

It is quite patent that the copies received by the railway must have included the plaintiff's firm name and address and the reason given by the Full Bench for their rejection of them is quite untenable.

It is suggested before me that, because the notice contains a threat to bring proceedings unless the claim is made good within seven days, it was not a good notice under section 80. I do not think that a statement, in a notice under section 80, implying that proceedings would not be brought if the claim was satisfied, can in any way detract from its value as a notice under section 80. A part of the object of the provisions of the section is to give the recipient of a notice an opportunity to consider whether to accept the claim or not.

The only question then that remains is whether it is essential that notices under section 77 of the Railways Act, and section 80 of the Civil Procedure Code must be written on separate pieces of paper, and must be specifically labelled with their descriptions. I do not think that this is essential. The Full Bench has disposed of the argument by saying that the purpose of the two sections are quite different. The main difference between the two sections of course is that, under section 77 of the Railways Act, the party is barred from ever being able to recover the claim unless notice is given to the Railway within a certain period of the occurrence in connection with which the claim is made; whereas the service of notice under section 80 fixes a period of two months within which no suit on the claim mentioned in the notice can be brought. If the notice given is within the limits of time taken from either end it may well comply therefore in this respect with the purposes both of section 77 of the Railways Act and section 80 of the Civil Procedure Code. The notice under section 80 must of course be a notice indicating that a suit will be brought. The cause of action is to be stated. It may be, in some cases, that a notice under section 77 could not, by any reading of its contents, be said

to comply with the requirements of section 80. But in the present case, as I have indicated, the terms of the notice sent do comply with the requirements of section 80 and if in fact it had been labelled as a notice under section 80, I do not think there would have been any argument that it was not a proper notice under the section. That one paper may serve the purpose of both the sections in certain circumstances has been held in the case of *Radha Shyam Basak v. Secretary of State for India* (1) though in that case it was held that the notice served as a notice under section 80 also could be treated as a notice under section 77 of the Railways Act.

CIVIL.
—
1951.
Dharamsi Lila-
dhar Vora
v.
Union of India.
Roxburgh, J

As a result of the amendment to section 80 of the Civil Procedure Code, it so happens that notices under each of the sections are required to be served on or delivered to, in the case of claims in respect of loss on a State Railway, the same person, namely, the General Manager of the Railway. Hence, if the contents of the paper giving notice fulfil the requirements of both section as is the case here, and are correctly delivered, I consider that due notice has been given thereby under both the sections.

The result is that I make the Rule absolute and return the case to the trial Judge for disposal on the merits. The petitioner is entitled to his costs of this Rule.

(1) 44 Cal. 16.
S.D.G.

Rule made absolute.

INDEX OF CASES.

Vol. 87.

—(0:)—

	PAGE
Abatement of suit —Civil Procedure Code (Act v of 1908)- 0. 23,	
R 9 (2)—“ Sufficient cause ” When made out.	23
Address appearing under a maker's signature or at the top of the document, if forms part of the contract.	
Dugarmall Kissenlal v. Shambhu Charan Panday	251
Alternative remedy , if always a bar in issuing directions—Such remedy to be an adequate one in the circumstances of the case	369
Alternative remedy , whether bars issue of a writ of certiorari—Court, if has Jurisdiction to prevent enforcement of a bond or contract executed by the petitioner by writ of mandamus or certiorari	201
Appellate Court , when can interfere with the discretion of the Judge under Chap. 10, R. 35 of the High Court Original side Rules	26
Arbitration —Setting aside an award - Dispute whether one is a party to the contract-Jurisdiction of the arbitrator	123
Attachment before Judgment —Guiding principles for application of O. 38 rr. 5 and 6 O. P. O.	41
Bengal Chamber of Commerce Effect of the appointment of as arbitrator	71
Bengal Finance (Sales Tax) Act 1941 —Section 15—rule 71—Repeal of Sec. 18 by Ordinance X of 1950—Delegation of powers—Validity	314

	PAGE
Bengal Finance (Sales Tax) Act 1941 —Sec. 17—Transferee of the whole of the undertaking, if comes within the meaning of section 17.	
Major Soap Co. Ltd. v. Assistant Commissioner of Commercial Taxes, Calcutta	314
Bengal Municipal Act —Section 531 to preclude a remedy under Article 226 of the Constitution on ground of existing alternative remedy by way of appeal under the Act against an order passed under the Act.	
Sk. Mangru Meya v. Commissioners Budge Budge Municipality	369
Bengal Tenancy Act. —(VIII B. C of 1885) Sec. 72, if attracted in respect of a sale under Land Revenue Sales Act. ...	163
Calcutta Municipal Act. —(III B. C, of 1923)—Sec. 535—Public nuisance Corporation's duty—Petitioner's Costs, if to be paid by the Corporation.	
A. O. Dhar v. Dhananjoy Das ...	188
Calcutta Thika Tenancy Act. —(II W. B. C. of 1940)—Thika tenant's definition of tenant to prove a system.	
Bajinath Bajoria v. Sk. Md. Mateen ...	33
Civil Procedure Code —Order VI Rule 17—Amendment of pleadings—Principles which may be followed—What amendments can be allowed and in what circumstances.	
Krishna Kishore Ghosh v. Kishori Debi Kishain ...	398
Civil Procedure Code. —(Act. V of 1908), O. 38, rr. 5 & 6—Guiding principles—Attachment before judgement.	
Premraj Mundra v. Md. Maneek Gazi ...	41
Code of Civil Procedure. —(Act V of 1908),—O. 41, R. 27—Principal of production of additional evidence in the Appellate Court—Finding reached on the basis of additional evidence which ought not to have been admitted, if conclusive in second appeal.	
Arjun Singh v. Kartar Singh ...	243
Concurrent findings on pure questions of fact, when can be interfered with in second appeal.	
Firm Srinivhar Ram Kumar v. Mahabir Prosad ...	236

	PAGE
Constitution of India—Art. 20 (2)—right to get admitted into an educational institution—Refusal on the ground of communal G. O., if an infringement of fundamental right—"Directive principles" if to run subsidiary to fundamental rights.	
The State of Madras v. Sm. Champakam Dorairajan	379
Constitution of India, Art. 226—Closing down of slaughter house by a Municipality under a resolution—Resolution beyond jurisdiction of Municipality—If can be interfered with under Art. 226—Directive principles by any Court	369
Constitution of India—Article 226—Conditions precedent to the issue of a writ of mandamus—Whether writ of mandamus can be issued to enforce a contract.	
Carlsbad Mineral Water Manufacturing Co. Ltd. v. H. M. Jagtiani	149
Constitution of India—Art 226, scope of	109
Constitution of India—Art. 226—Prayers—Court's power to amend to meet exigencies of the case	391
Constitution of India—Art 226—Writ of certiorari, if can be issued when Controller wrongly decides a payment as premium.	
Sankar Brothers v. Anil Kumar Dutt	362
Constitution of India—Art. 226—Writs mandamus, prohibition and certiorari—Sea customs Act, Secs. 182 to 184, 198—"Adjudicate" in Sec 182 of the Sea Customs Act, meaning of—Principles of natural justice	201
Constitution of India—Art. 227—Its application in ordinary Cases	318
Constitution of India—article 395—Effect of repeal of the Indian Independence Act, if affects rights already accrued—If such rights saved by virtue of Article 367 of the Constitution which attracts section 6 of the Indian General Clauses Act.	
Protap Kumar Sen v. Nagendra Nath Mazumder	414
Contract of reconveyance of land—Specific performance of—Time, if to be considered as the essence of the contract.	192
"Control" Under S. 19 (f) of the Indian Arms Act—Meaning of Wife's possession of a pistol without licence, if can mean husband's possession under the Indian Arms Act.	
The State v. Narendra Nath Mazumdar	58

	PAGE
Criminal Procedure Code (V of 1898)—Sec. 438.—Maintenance, meaning of—Order for annual payment, bad in law—Child, meaning of.	
Purnashashi Debi v. Nagendra Nath Bhattacharjee	185
Default in payment of rent—Previous to. Rent Act of 1948 Defaulter for three periods of two months each—Defaulter, if entitled to protection under Sec. 18(5) of the Rent Act, 1950	4
Dispute Under the contract—Construction of the contract, whether a matter for the Court or for the arbitrator.	
A. M. Mair & Co., v. Gordhandas Sagarmull	123
English Arbitration Act.—Sec. 14 (1), if applicable in this Country for the purpose of substantial justice	
Bhawalka Brothers Ltd. v. Fatchchand Murlidhar	71
Entrustment—Under section 406 of the Indian Penal Code—If at all takes place before dissolution of accounts	280
High Court Original Side Rules—Chap. 10, R. 35—Suit placed in the Special List-Dismitted for default, if within the discretion of the presiding judge	
Mahadeo Prosad Rungta v. Sm Laxmi Debi	26
Holder in due course—under section 9 of the Negotiable Instruments Act—Endorsee of a pro-note, if such a holder	251
Indian Arbitration Act—(X of 1940), Secs. 5 & 34—Application under —Difference between	71
Indian Arbitration Act (X of 1940) Secs. 5 and 34 Discretion of the Court under Secs. 5 when and how to be exercised	71
Indian Arbitration Act, Sec. 32—Right to bring a suit under Sec. 9 of the Civil Procedure Code	252
Indian Arms Act—(XI of 1878) Sec. 19 (f) read with Sec. 19 (A)—Possession, Various theories and Concept of "possession" under S. 27 I. P. C., if applicable to explain 'possession' under the Indian Arms Act	58
Indian Income Tax Act—Sec. 33A—Power of revision by the Commissioner under that Section—If an adequate legal remedy	
Elbridge Watson v. B. K. Das	109
Indian Income Tax Act—(XI of 1922) 'Amount due' in Sec. 46(5) (a), meaning of	109

	Page
Indian Income Tax Act—(XI of 1922), S. 67—Bar of suits—Retrospective effect of Art. 226 of the Constitution ...	109
Indian Independence Order, 1947—Art 8(1)—Rights and liabilities under a contract—Whether Pakistan or Union of India is liable under the contract—Principles determining liability Elahi Bux v. Union of India ...	307
Indian Independence (Legal Proceedings) Order, 1947—Section 4(1)—Orders in pending proceedings—Forwarding certificate, of non-satisfaction from Jessore Court (Pakistan) to Alipore Court (Indian Union), if can be given effect to—Effect of repeal of order ...	414
Indian Partnership Act—Sections 9, 10, 13, 15, 19 and 24—Precise relations between partners—If the above sections can lead to the conclusion that one partner can commit the offence of Criminal breach of trust Bhuban Mohan Das v. Surendra Mohan Das ...	280
Indian Penal Code—Section 406—Charge under, if can be framed against a partner ...	280
Indian Penal Code,—Sec 411—Mere possession without proof of knowledge that the articles are stolen—No case against the accused, yet accused called upon to explain possession and enter his defence disbelieved—Conviction, if proper Bharadwaj Singh v. The State ...	387
Land Revenue Sales Act, (XI of 1859) Sec 7—Object of the notice. Maharajadhiraj Uday Chand Mahatab Bahadur v. Sarajini Debi ...	163
Law, regarding disqualification of the arbitrator ...	71
Letters Patent, Clause 13—Leave under —Application for revocation of leave—Revocation not justified at certain stage—When not justified. Chittaranjan Mukherji v. Barhoo Mahto ...	420
Limitation Act, (IX of 1908) Art 164—Setting aside an <i>Ex parte</i> decree—O, 9 r. 13 O. P. O., if applicable on the Original side of the High Court. Devji Shivji v. Santi Sarup Chaturvedi ...	169

	PAGE
Specific Relief Act —(1 of 1877)—Sec. 45—Writ of Mandamus, always discretionary—Suit, if a "Specific legal remedy" within the meaning of Sec. 45 ...	217
Subsequent mortgagee —If bound to redeem the prior mortgagee, when such suit instituted after period of limitation to enforce the mortgage	
Bipra Charan Sarkar v Sm Rupeswari Dasi ...	37
Suit on a Promissory note —Evidence of an agreement only postponing the time of payment and without making the contract conditional upon certain event, if admissible under proviso 3 of Section 92 of the Indian Evidence Act. —	251
Transfer of Property Act, Sec. 115 —Surrender of a lease—Sublease, if affected thereby	
Mohammed Ibrahim v Beni Madhab Mullick ...	345
West Bengal Jute Goods Future Ordinance, 1949 — "Actual delivery of possession" in Sec. 2(1) (b) of the Ordinance, meaning of ...	71
West Bengal Premises Rent Control Act of 1948 — Sec 4—Selami or premium, meaning of ...	362
West Bengal Premises Rent Control Act, 1948 —Secs. II (1) (c) II (1) (e)—"Using or allowing to be used for immoral purposes" meaning of—"Immoral" insubclause (c), if limited by ideas & notions as expounded and defined in Bengal Suppression of Immoral Traffic Act—Annoyance, what is —Nuisance	
Kanchanmala Dassi v. Lilabati Debi ...	332
West Bengal Premises Rent Control Act of 1948 — Sec. (11) (1) (b)—Unlawful subletting, what is—Surrender of lease ...	345
West Bengal Premises Rent Control Act, 1950 — Fixation of standard rent under the Act ...	322
West Bengal Premises Rent Control (Temporary Provisions) Act, 1948 , Sec. 12 (2)—Deposit of arrears of rent—No notice to the landlord—Not a payment through Court within the meaning of Sec. 12 (2) ...	44

	PAGE
Post as the medium of Communication—Payment of consideration not essential at the time of the exercise of the option.	
Protap Ohandra Koyal v. Kali Oharan Acharya	197
Powers of the Chief Judge under section 32 of the Rent Act, 1948.	
Indra Kumar Karnani v. C. C. Ganguly ...	129
Presidency Small Cause Court , not entitled to entertain an application under Sec. 11 (3) of Act XXXVIII W. B. of 1948—Only remedy of the subtenant—To institute a regular suit for that purpose.	
Thakurdas Pushpraj v. Dwarka Prasad Bazar	181
Privileged Communication , between husband and wife, extent of	58
Public purpose —Opinion of the Provincial Government—An executive or administrative Act	140
Receiving or holding Property —By a partner—If can be said to receive or hold the same in fiduciary capacity—Circumstances under which it can be said so ...	280
Rent , Whether includes the payment for services rendered by the landlord—Written agreement for tenancy—Rent, meaning of Residence Limited v. Surendra Mohan Banerjee ...	322
Sea Customs Act (VIII of 1878) Sec. 198, when and under what circumstances a bar to a proceeding—Prerogative writs, if proceedings within the meaning of Sec. 198	
Soorajmull Nagarmull v. The Assistant Collector of Customs ...	201
Specific Performance of a Contract to sell a house—Plaintiff fails to prove contract of sale—Defendant admits a loan from the plaintiff—No claim for loan advanced in the plaint—Absence of any alternative case in the plaint—Court, if can give relief to the plaintiff on the basis of an alternative claim admitted by the defendant and which could have been made by the plaintiff ...	236
Specific Relief Act —Sec. 39—Scope of the applications of Secs 32 & 33 of the Indian Arbitration Act—Arbitration clause, if an integral part of the Contract	
The State of Bombay v. Adamjee Hajee Dawood & Co. ...	352

	PAGE.
"Malafide" Order of the Government Grounds on which the Court can hold that—Article 19 (1) (f) and Article 31 of the Constitution	149
Medical Certificate , When admissible to evidence.	
Mehatabchand Dhandia v. Shriratan Mohta	23
"Misrepresentation" under Rule 65 of Schedule 17 of the Calcutta Municipal Act—Persons to be satisfied under that rule.	
Sailendra Nath Banerjee v. Satyendra Nath Roy	217
Mortgage —Prior mortgagee not making subsequent mortgagee a party to his mortgage suit purchases the property—Suit for recovery of possession of such property from the subsequent mortgagee who purchased the mortgaged property in execution of his decree, if maintainable	37
Negotiable Instruments Act , Sec. 46 and Indian Evidence Act, Sec. 92 to be read together	251
Negotiable Instruments Act , (XXVI of 1881), Sec 69 Specific place, meaning of	251
Notice of Suit —Section 77 of the Indian Railways Act and section 80 of the Civil Procedure Code—one notice satisfying requirements of both sections, if valid:	
Dharamji Lladhar Vora v. Union of India	425
Order , if should give details of acts not to be performed or descriptions of persons not to be associated with	1
Order of restraint , if should disclose the nature of subversive act	1
Partition Suit ,—Prayer for setting aside prior compromise decree on the ground of fraud, if main relief—Jurisdiction of a Co-ordinate Court to entertain a suit for setting aside a decree passed by another Court.	
Sm Matangini Dassi v. Kshirodi Narayan Bhunia	375
Partnership assets , meaning of—Fundamental concept of partnership precludes possibility of entrustment	280
Payment of decretal amount —Decree passed without interest—Payment, if amounts to payment according to Sec. 12 (2) of the Rent Act, 1948	4

	PAGE
West Bengal Premises Rent Control (Temporary Provisions), Act 1950 —Subletting major portion—Major portion of the premises, how to determine <i>Sreenarain Munsingka v Amarnath Mishra</i>	4
West Bengal Premises Rent Control (Temporary Provisions) Amendment Act —(L. XII W. B. C. of 1950) Sec 6.—Whether the word “may” should be read as “shall”—Court’s power under the suit is discretionary <i>Satyendra Chandra Sen v S B Trading Co, Ltd</i>	174
West Bengal Premises Rent Control Act 1950 —Sec 18 and West Bengal Act LXII of 1950. Sec 5 “Decree for recovery of possession” in Sec 18, construction of—“Pending” in Sec 5 meaning of <i>Mohan Lal Khattri v. Chunilal Khettry</i>	318
West Bengal Premises Requisition & Control Act —(V W B. C. of 1947) Not ultra vires the Constitution <i>Sudhindra Nath Datta v. Sailendra Nath Mitra</i>	140
West Bengal Security Act —(XIX W. B. C. of 1950), Sec 38—Power of delegation, if ultra vires <i>Dr Jatish Chandra Ghose v. B. K. Sinha</i>	1
Writ of mandamus —Constitution of India, Art. 226—Whether available in cases where efficacious and adequate remedy is provided in the Act and where there has been no refusal to exercise jurisdiction nor any excess of jurisdiction	314
Writ of Mandamus —Art 226 of the Constitution of India and Sec 45 of the Specific Relief Act—Right of appeal if always an adequate—remedy for refusing prerogative writs—Alternative remedy is a factor to be considered by Court in the exercise of its discretion to issue writs <i>Monoranjan Ray v The Collector of Customs</i>	391
Writ of Mandamus —Order of requisition of premises under Section 3 (1) of the West Bengal Requisition and Control (Temporary Provisions) Act (V W. B. C. of 1947)	140
Writ of Prohibition or Certiorari —W. B. P. Rent Control Act, 1948, Section 34 (4)—Decide the appeal, construction of	129